Supreme Court, U.S.
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Case No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MARY ANN VANCE,

Petitioner,

vs.

SOUTHERN BELL TELEPHONE
& TELEGRAPH COMPANY,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

Petition for Writ of Certiorari

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Atlantic Beach, FL 32233
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October 19, 1994 *Attorney for Petitioner*

QUESTIONS PRESENTED

1. Where the District Court erroneously vacated Plaintiff's $3.5 million verdict entered on April 13, 1987, after the first of two successful, two-week jury trials, on her claim of racial discrimination in employment, under 42 U.S.C. §1981, and where the Eleventh Circuit, on January 23, 1989 (Vance I), reversed the District Court's JNOV and ordered a new trial, expressly rejecting Defendant's argument that Plaintiff's §1981 claim was barred by *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986); and where the District Court, prior to retrial, denied Defendant's Motion for Summary Judgment premised on this Court's intervening decision in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), basing that denial upon a detailed analysis of this Court's ruling on retroactivity set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971); and where, upon retrial in 1990, a second jury awarded the Plaintiff in excess of $1 million; but where the Eleventh Circuit thereafter ruled, on February 5, 1993 (Vance II), that the second verdict, too, must be vacated, based upon retroactive application of *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), and where one judge of the Eleventh Circuit described that Court's decision in Vance II as a "manifest injustice," leaving the Plaintiff without a legal remedy, despite two successive jury verdicts in her favor, has the Plaintiff's Seventh Amendment guarantee of trial by jury, or Fifth Amendment guarantee of due process been violated?

2. Whether a three-judge panel of the Eleventh Circuit (Fay, Circuit Judge, dissenting) erroneously affirmed the district court's entry of directed verdict against the Plaintiff at the close of her case on her tort claim of intentional infliction of emotional distress, under Florida law, upon a legal determination that a continuous and oppressive pattern of racially motivated intimidation and harassment on the part of Plaintiff's fellow workers and supervisors, including nooses twice left at Plaintiff's work station by her supervisor, did not amount to "outrageous" conduct?

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SOUTHERN BELL TELEPHONE
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**ON WRIT OF CERTIORARI TO THE
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Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Vance v. Southern Bell Telephone and Telegraph Company,* 983 F.2d 1573 (11th Cir. 1993) ("Vance II"). The petition for rehearing and suggestion of rehearing en banc on this matter was denied on July 21, 1994. The opinion of the United States Court of Appeals for the Eleventh Circuit on the first appeal in this case is reported at *Vance v. Southern Bell Telephone and Telegraph Co.*, 862 F.2d 1503 (11th Cir. 1989) ("Vance I"). The United States District Court for the Middle District of Florida, Jacksonville Division, issued findings of fact and conclusions of law on August 11, 1987. These findings are reported at *Vance v. Southern Bell Telephone and Telegraph Co.*, 672 F. Supp. 1408 (M.D. Fla. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1993.

Petitioner filed a petition for rehearing and suggestion of rehearing en banc which was denied on July 21, 1994.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Seventh and Fifth Amendments to the Constitution of the United States:

> I. No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment V.

> II. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the common law.

U.S. Constitution, Amendment VII.

STATEMENT OF THE CASE

Mary Ann Vance was first employed with the Defendant in March, 1972. Upon a change of assignment and location on August 13, 1984, Mrs. Vance, a black woman, was racially harassed in a terrifying and systematic manner by certain of her new supervisors and co-workers. She ultimately had a nervous breakdown on the job and was thereafter separated from the Company in 1985 and ultimately terminated in October of 1986. On March 27, 1986, Vance brought suit in the U.S. District Court for the Middle District of Florida, Jacksonville Division, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Her case went to the jury on the issues of racial discrimination and constructive discharge, in violation of 42 U.S.C. §1981. On April 13, 1987, an all-white jury awarded Mrs. Vance $1,045,700 in compensatory damages and $2.5 million in punitive damages, finding that the Defendant, acting through certain of its supervisory employees, had acted with "malice" and "evil motive." Thereafter, on August 11, 1987, the District Court granted Defendant's Motion for JNOV, finding that reasonable jurors could not have found for the Plaintiff, alternately granting a new trial.

On January 23, 1989, the Eleventh Circuit reversed the JNOV and ordered a new trial (Vance I). Before the second trial commenced, this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) intervened. Thereupon, the Defendant sought a summary judgment, on the grounds that Plaintiff's §1981 claim was no longer viable. The District Court denied the motion, determining it would be inequitable to apply *Patterson* retroactively, based upon an analysis of this Court's decision in *Chevron Oil v. Huson*, 404 U.S. 97 (1971).

The case proceeded to trial for a second time in 1990. After two weeks of trial, another all-white jury ruled in favor of Vance, awarding her more than $1 million, and again finding that the Defendant had acted with "malice" and "evil motive" toward the Plaintiff. The District Court denied the Defendant's various post-trial motions. The Defendant appealed.

On February 5, 1993, a three-judge panel of the Eleventh Circuit reversed the District Court for failing to grant summary judgment, based on *Patterson*. One Judge of that panel stated that the Court's opinion resulted in a "manifest injustice," but that the result was compelled by the state of judicial precedent. The Eleventh Circuit panel also affirmed the District Court's entry of directed verdict on Plaintiff's tort claim of intentional infliction of emotional distress, under Florida law, with one Judge dissenting.

On July 21, 1994, the Eleventh Circuit summarily denied Plaintiff's petition for Rehearing En Banc.

Plaintiff is seeking reinstatement of the jury's 1990 verdict on her §1981 count or, alternately, a new (third) trial, under 42 U.S.C. §1981, and reinstatement of her tort count for intentional infliction of emotional distress, under Florida law.

ARGUMENT

QUESTION 1

Two different all-white juries, on two separate occasions, returned substantial verdicts for the Plaintiff for racial harassment and constructive discharge in violation of 42 U.S.C. §1981. Plaintiff's first verdict in 1987, for 3.5 million dollars, was remanded for a new trial in 1989 after the Eleventh Circuit determined that there was sufficient evidence to support the determination of liability, but the damages were excessive. *Vance v. Southern Bell*, 863 F.2d 1503 (11th Cir. 1989). "Now, her second verdict is ground to dust between the upper millstone of the decision not to apply the Civil Rights Act of 1991 to her case, and the lower millstone of *Patterson*, a decision on which no one in this case could be said to have relied." *Vance v. Southern Bell*, 983 F.2d 1973, 1578 (11th Cir. 1993)(Fay, J. concurring). Although finding himself constrained by the decision in *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992), on which he sat as a member of the panel, Judge Fay filed his own opinion because "the application of the rules articulated in *Baynes* lead, in Mary Ann Vance's case, to a manifest injustice." *Id.*

Shortly after remand from the first appeal (Vance I), the Supreme Court issued its decision in *Patterson v. McLean Credit Union*, 494 U.S. 164 (1989), which interpreted §1981 as not including claims of racial harassment. The trial court was, thus, presented with a choice of law as to whether to apply the law that existed at the time the racial harassment occurred in 1985 or to apply the decision in *Patterson* retroactively. The trial court decided that it would be unjust to apply *Patterson* retroactively after the parties had relied upon the pre-*Patterson* prohibition of racial harassment at the time the harassment occurred and throughout nearly four years of litigation. A re-trial before a second all-white jury resulted in another verdict for the Plaintiff for more than one million dollars.

In Vance II, the 3-judge panel of the Eleventh Circuit was presented with the same choice of law earlier confronted by the district court, but by this time Congress had nullified *Patterson* by enacting the Civil Rights Act of 1991. Thus, the choice of law for the Vance II panel was between applying the law that existed at the time the racial harassment occurred in 1984 and at the time of the appellate review in 1993, or applying *Patterson* retroactively despite the fact that it had already been nullified by Congress. The panel chose to apply *Patterson* retroactively, but not to apply the statutory nullification of the decision retroactively. The panel held that *Patterson* is retroactive because of another intervening decision of the Supreme Court, *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), which did not exist during any of the trial court proceedings. At the time of the decision below not to apply *Patterson* retroactively, the district court correctly applied the rules regarding retroactive application of caselaw set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971). The Vance II panel chose to apply *Patterson* based on *Beam* despite the fact that neither of these decisions was the law at the time the wrongs occurred in 1984, at the time of Southern Bell's first conviction in 1987 or at the time of the first appellate mandate in 1989. *Patterson* was also not the law at the time of the second appellate mandate in February of 1993.

Judge Fay in his concurring Opinion questioned this result by pointing out that "in *Beam* the Court was dealing with the retroactive application of its interpretation of constitutional law -- an area given over almost exclusively to the courts. In contrast, *Patterson* was a judicial interpretation of a statute." *Vance*, 983 at 1579, n.6. Because "the court's role in statutory interpretation is to uphold legislative intent, not to make new law," Judge Fay would hold that "when Congress rejects the Supreme Court's interpretation of a statute," the court's "constitutional role is to limit the operation of that erroneous interpretation, not to expand it" by retroactive application. *Id.* at 1579. Judge Fay reasoned that "to keep *Patterson* on `life support' by applying it to cases beyond those tried in reliance upon it, like *Baynes*, or for which it provided the governing standard at the times the acts occurred, makes the [Supreme] Court's reassurance in *Patterson* that `Congress remains free to alter what we have done' ring hollow." (Quoting *Patterson*, 109 S.Ct. at 173). In Judge Fay's view, to apply a decision retroactively which has already been nullified by Congress, "raises troubling questions of separation of powers."

Judge Fay also found that the policy behind retroactive application of caselaw set forth in *James B. Beam Distilling, supra*, did not support retroactive application of a case that has already been nullified by Congress. *Vance*, 983 F.2d at 1579, n.1. The policy behind retroactivity of caselaw "`derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are or may still come to court'". *Id.* at 1579, (quoting *James B. Beam*, *supra*, Blackmun, J., concurring, joined by Scalia, J. and Marshall, J.). For Judge Fay this policy is inconsistent with applying *Patterson* retroactively because in doing so "[w]e are not only applying a principle already determined to be wrong, but we do so in a context where this principle was not relied upon by anybody in the case as the relevant law." Thus, Judge Fay would hold that neither the decision in *Beam*, nor the policy behind retroactive application of caselaw, supports retroactivity of a case such as *Patterson* which involves a statutory interpretation of Congressional intent which already has been repudiated as wrong by Congress itself.

In regard to the application of this Court's decision on retroactivity in *Baynes*, Judge Fay also disagreed with the other members of the panel. He states that "the application of the rules articulated in *Baynes* lead, in Mary Ann Vance's case, to a manifest injustice." *Id.* at 1578. Judge Fay found two decisive differences between *Baynes* and the current case. First, unlike *Baynes*, this case was tried on the basis of the pre-*Patterson* state of the law and affirmance would uphold, rather than upset, the district court's judgment. *Id.* (courts should not "keep *Patterson* on `life support' by applying it to cases beyond those tried in reliance upon it, like *Baynes*, or for which it provided the governing standard at the times the act occurred.") Secondly, the twice-proven racial harassment and discrimination was illegal when it occurred in 1985, and at all other times since then, including the short period between the issuance of *Patterson* on June 15, 1989 and its nullification on November 21, 1991. *Id.* at 1579, n.3. ("There is no dispute that the discrimination and harassment of which Southern Bell was accused, was, is and always has been illegal, irrespective of any retroactivity given to either the Civil Rights Act of 1991 or *Patterson*." For this reason, "it cannot be said that anyone in this case relied on *Patterson*, either for knowledge of what the law prohibited or for estimating liability in the event the law was broken.") *Id.* In this posture, Judge Fay found manifest injustice in relieving Southern Bell of liability for racial harassment known to be wrong when it occurred and at all times since." (As Justice Scalia noted ... `The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal'".)

The two other members of the panel did not join in Judge Fay's concerns, but one of them, Chief Judge Tjoflat, joined in the decision four days earlier in *Curtis v. Metro Ambulance Service, Inc.*, 982 F.2d 472 (11th Cir. 1993), which stated that "the issue of statutory retroactivity in general, and retroactivity questions involving the Civil Rights Act of 1991 in particular, are of exceptional importance warranting en banc review."

In this case, however, the Vance II panel concluded that the decision in *Baynes* should control for two reasons: (1) the "*Bradley* factors" applied in *Baynes* also applied here "[b]ecause judgment in this case was entered in May, 1990, before the effective date of the Act"; and (2) because of the "principle that `litigants in similar situations should be treated the same.'" *Vance*, 983 F.2d at 1578. [applying *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974), and quoting *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2444 (1991)]. No other reasons for applying *Baynes* were given. Judge Fay disagreed with both of these reasons. As to the "consistency" of treatment thesis, Judge Fay demonstrated that *Baynes* is not similar to the current case which involves pre-*Patterson* conduct which was tried under pre-*Patterson* principles of law. He reminded that "consistency is not one of many values with which we must be concerned" and that "justice is better than consistency." *Id.* at 1580.

Despite these arguments, on July 21, 1994, the Eleventh Circuit denied Plaintiff's Petition for Rehearing En Banc. As a result, Plaintiff has been denied her Seventh Amendment guarantee of trial by jury and her Fifth Amendment guarantee of due process of law.

QUESTION 2

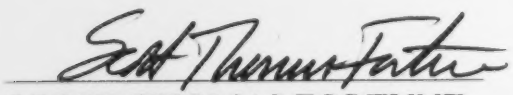
Mary Ann Vance testified to a continuous and oppressive pattern of intimidation and harassment on the part of her fellow workers and supervisors at Southern Bell. That Southern Bell would allow such an atmosphere to develop, or having been appraised of it, fail to take the firmest possible steps to eradicate it, is by itself outrageous. But of all of those incidents, two stand out as particularly horrific -- the nooses twice left at Vance's work station. The noose in this context is a symbol not just of racial discrimination or of disapproval, but of terror. Those of us for whom a particular symbol is just that -- a symbol -- may have difficulty appreciating the very real, very significant fear that such symbols inspire in those

to whom they are targeted. No less than the swastika or the Klansman's hood, the noose in this context is intended to arouse fear. If a jury would not cry "Outrageous!" upon hearing these facts (and I think these juries did through their verdicts), I cannot think of a set of facts for which it would.

Vance II, 983 F.2d at 1583 (Fay, J. dissenting).

By directing a verdict against the Plaintiff at the close of her evidence, on her tort count, when the jury expressly found that under §1981, based on the same facts, that the Defendant's conduct was "malicious" and "evil," the district court erroneously denied the Plaintiff her Seventh Amendment right to trial by jury, on her tort claim. The three-judge panel of the Eleventh Circuit (Fay, J., dissenting) erroneously affirmed the district court's directed verdict, on the grounds that the Plaintiff's allegations did not amount to "outrageous" conduct on the part of the Defendant, Vance II, 983 F.2d at 1575, n.7., so that the Plaintiff has been wrongfully deprived of her Seventh Amendment guarantee of trial by jury, warranting reinstatement of her claim for intentional infliction of emotional distress, and a new trial on that claim.

Respectfully submitted,



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APPENDIX

I. OPINION OF THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED

A. *Vance v. Southern Bell Telephone and Telegraph Co.*, 983 F.2d 1573 (11th Cir. 1993).

II. ANY OTHER OPINIONS, FINDINGS OF FACT AND CONCLUSIONS OF LAW RENDERED IN THE CASE BY COURTS

A. *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989).

B. *Vance v. Southern Bell Telephone and Telegraph Co.*, 672 F. Supp. 1408 (M.D. Fla. 1987).

III. ANY ORDER ON REHEARING

A. Rehearing en banc denied on July 21, 1994.

APPENDIX I-A

Vance v. Southern Bell Telephone and Telegraph Co.,
983 F.2d 1573 (11th Cir. 1993)

MARY ANN VANCE, Plaintiff-Appellee, Cross-Appellant,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

a Georgia Corporation, Defendant-Appellant, Cross-Appellee, JOYCE FOSKEY, ET AL., Defendants.

VANCE v. SOUTHERN BELL TEL. & TEL. CO.

No. 90-3559

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

983 F.2d 1573; 1993 U.S. App. LEXIS 2009; 61 Fair Empl. Prac. Cas. (BNA) 925; 60 Empl. Prac. Dec. (CCH) P42,049; 7 Fla. Law W. Fed. C 43

February 5, 1993, Decided
February 5, 1993, Filed

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: Appeals from the United States District Court for the Middle District of Florida. D. C. Docket No. 86-00227-CIV-J-16. D/C Judge MOORE

DISPOSITION: REVERSED.

COUNSEL: For MARY ANN VANCE, Plaintiff-Appellee, Cross-Appellant: Charles Cook Howell, III, COMMANDER, LEGLER, WERBER, DAWES, SADLER and HOWELL, Post Office Box 240, 200 Laura Street, The Greenleaf Building, Jacksonville, Florida 32201, (904-359-2000), Robert L. Wiggin, Jr., 1400 SouthTrust Twr, B'ham, AL 35203/205-328-0640, William J. Sheppard, SHEPPARD and WHITE, P.A., 215

Washington Street, Jacksonville, Florida 32202, (904-346-9661), Scott Fortune, 447 Atlantic Blvd., Suite 2, Atlantic Beach, FL 32233, (904) 246-2125.

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AMICUS CURIAE: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, Julius L. Chambers, NAACP Legal Defense, 16th Floor, 99 Hudson Street, N.Y., N.Y. 10013, (212) 219-1900.

EEAC: Douglas S. McDowell, 1015 15th St., N.W., Washington, D.C., 20005, (202) 789-8600.

JUDGES: Before TJOFLAT, Chief Judge, FAY and EDMONDSON, Circuit Judges.

OPINION BY: EDMONDSON

OPINION: [*1574] EDMONDSON, Circuit Judge:

Mary Ann Vance won a jury verdict on her claim that Southern Bell Telephone and Telegraph Company ("Southern Bell") violated her rights under 42 U.S.C. § 1981. Southern Bell appeals the denial of its motions for summary judgment, directed verdict and judgment notwithstanding the verdict on Vance's section 1981 claim. We reverse.

I. Background

A. The First Trial: Vance I

This case is detailed in Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir.1989) ("Vance I"). To review, Mary Ann Vance in 1986 brought an action under 42 U.S.C. § 1981[1] against her former employer, Southern Bell. Vance said that various acts of racial harassment had injured her and driven her from her job.[2] A jury returned a verdict for Vance on her racial

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[1]42 U.S.C. § 1981 contains section 1 of the Civil Rights Act of 1866. It provides:

> All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981(a) (West 1981 & Supp. 1992).

[2]Vance claims Southern Bell violated section 1981 by: (1) hanging a rope "noose" over her work station shortly after she started work in August 1984; (2) suspending her in September 1984 for an offense for which white employees were not suspended; (3) "subjecting [Vance] ... to a physical altercation with a white [female] co-worker" in October 1984 and disciplining only Vance for the incident; (4) sabotaging her work on a pay phone; (5) refusing to treat her equally in disciplinary proceedings unless she dismissed charges of racial

harassment claim and awarded multi-million dollar damages, but the district court granted Southern Bell's motion for JNOV or a new trial. *Vance v. Southern Bell Tel. and Tel. Co.*, 672 F. Supp. 1408 (M.D.Fla.1987). On appeal, we reversed the JNOV, but allowed a new trial. 863 F.2d at 1506. The Vance I panel decided that the evidence was sufficient to hold Southern Bell liable for racial harassment, but that the size of the jury's award was "outside the realm of reasonableness" given the evidence. *Id.* at 1516. This appeal arises from the retrial of the action.

B. The Second Trial

After we decided Vance I, the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).[3] In Patterson the [*1575] Court held

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discrimination then pending before a local government agency; (6) refusing to purge stale disciplinary actions from her file; (7) "confining her to the supervision of the white woman who attacked her in October ... causing her to suffer a nervous breakdown on the job"; (8) "intentionally transporting [Vance] to the wrong hospital during her nervous breakdown in an effort to cause her further trauma"; (9) refusing Vance's doctor's January 1985 request to transfer Vance to a different department; (10) continuing to refuse to transfer Vance, despite her doctor's requests, until October 1985; and (11) constructively discharging her on October 14, 1985 when she was physically and medically unable to continue working under her tormentors without a transfer to a department which did not harass or intimidate her." *Id.*

[3]In October 1987, some six months after the jury rendered its verdict in Vance I, the Supreme Court granted certiorari in *Patterson*. *Id.*, cert. granted, 484 U.S. 814, 108 S. Ct. 65, 98 L. Ed. 2d 29 (1987). Fifteen months later, with *Patterson* still

that racial harassment claims "[are] not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." 491 U.S. at 179, 109 S. Ct. at 2374 . Relying on *Patterson*, Southern Bell moved for summary judgment. The district court acknowledged the "inescapable conclusion that the holding in Patterson would preclude maintenance of this suit if it were filed today," but refused to apply the *Patterson* holding retroactively based on the equitable considerations outlined by the Supreme Court in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).[4]

This case then went to a jury trial in April 1990. The jury awarded Vance about a million dollars in compensatory and punitive damage on her section 1981 claim. The district court entered judgment for Vance and denied Southern Bell's renewed motions for directed verdict, JNOV or a new trial. In June 1990, Southern Bell appealed the section 1981 rulings.

In November 1991, while this appeal was pending, Congress enacted the Civil Rights Act of 1991, which, among other things, enlarges the range of behavior subject to section 1981 to include the "performance, modification, and termination" of contracts.[5] Under *Patterson*, plaintiffs alleging most kinds of post-hiring

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undecided in the Supreme Court, this court decided *Vance I*. *Vance I*, 863 F.2d 1503 (11th Cir.1989).

[4]R.Vol. 10-302.

[5]See 42 U.S.C.A. § 1981(b) (West 1981 & Supp.1992), codifying section 101 of the Civil Rights Act of 1991. Section 101 of the Civil Rights Act of 1991, enacted on November 21, 1991, amended 42 U.S.C. § 1981. The 1991 Act redefines the phrase "make and enforce contracts" to include "the making,

discrimination were limited to the set of equitable remedies provided under Title VII.[6] But under the Civil Rights Act of 1991, such plaintiffs may sue under section 1981 for damages.

II. Issues Presented

We must decide two related issues: First, whether the district court erred by refusing to apply Patterson retroactively; and second, whether the Civil Rights Act of 1991 overrules *Patterson* retroactively. We hold that the Supreme Court's decision in *Patterson v. McLean* Credit Union, which interpreted 42 U.S.C. § 1981 as it existed during all times material to this action, applies retroactively and barred Vance's section 1981 claim. We further hold that the Civil Rights Act of 1991, which extended the scope of section 1981 to performance and termination of contracts, applies prospectively and, therefore, has no bearing on Vance's bar under Patterson.[7]

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performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship," and protects these contractual rights "against impairment by nongovernmental discrimination and impairment under color of state law." See 42 U.S.C.A. § 1981(b), (c) (West 1981 & Supp.1992).

[6]See 42 U.S.C. §§ 2000e et seq. Mary Ann Vance made no claim under Title VII.

[7]We must also decide Vance's appeal of the dismissal of a state law claim for intentional infliction of emotional distress. We see no error. In Florida, "the issue of whether or not the activities of the defendant rise to the level of being extreme and outrageous so as to permit a claim for intentional

III. The 42 U.S.C. § 1981 Claim

A. The Nature of Vance's 42 U.S.C. § 1981 Claim

Vance claims that Southern Bell discriminated against her during her employment [*1576] at Southern Bell's Western Way service facility between August 1984 and October 1985. Supra note 2. Vance further says that by these "cumulative actions," Southern Bell effectively "terminated" her employment. R.Vol. 6-208, P 46. We understand Vance's claim to state three separate theories of liability: racial harassment, discriminatory denial of a transfer, and constructive discharge.

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infliction of emotional distress is a legal question in the first instance for the court to decide as a matter of law." *Baker v. Florida Nat'l Bank*, 559 So. 2d 284, 287 (Fla.Dist.Ct.App.1990). As we read Florida's decisions, the acts Vance alleged do not rise to the level of extremity or outrageousness required to sustain Vance's claim for intentional infliction of emotional distress. *See, e.g., Lay v. Roux Laboratories, Inc.*, 379 So. 2d 451, 452 (Fla. 1st DCA1980) (although "extremely reprehensible," racially hostile misconduct did not rise to the degree of "outrageousness or atrociousness" required to sustain a claim). See also *Mundy v. Southern Bell Tel. & Tel. Co.*, 676 F.2d 503, 505-506 (11th Cir.1982) (surveying Florida cases rejecting claims in employment context); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1007 (11th Cir.1986) (This court is bound by decisions of Florida's intermediate courts of appeals absent "some persuasive indication that the state's highest court would decide the issue otherwise."). Therefore, we affirm the district court's order directing a verdict for Southern Bell on the state law claim.

Vance's allegations describe the kinds of "postformation ... incidents relating to the conditions of employment" that were unactionable under section 1981. Patterson, 491 U.S. at 179, 109 S. Ct. at 2374 . Vance's allegations about her initial months of work at the Western Way facility describe the same kind of behavior — post-hiring racial harassment — that the Court held to be outside the scope of section 1981 in Patterson. *Id.* 491 U.S. at 177, 109 S. Ct. at 2373.

In a similar way, Vance's claim that Southern Bell wrongfully refused to transfer her to a different assignment within the company is unactionable under section 1981 because such "lateral transfers [do] not rise 'to the level of an opportunity for a new and distinct relation between the employee and the employer.'" *Jones v. Firestone Tire and Rubber Co.*, 977 F.2d 527 (11th Cir.1992) (Tjoflat, C.J.), quoting *Patterson*, 491 U.S. at 185, 109 S. Ct. at 2377. And it is settled in this circuit that, under the *Patterson* rule, section 1981 provides no relief on claims of discriminatory discharge. *E.g., Pearson v. Macon-Bibb Co. Hosp. Auth.*, 952 F.2d 1274, 1277-78 (11th Cir.1992); *Weaver v. Casa Gallardo*, 922 F.2d 1515, 1519-20 (11th Cir.1991). Thus we conclude that Vance's section 1981 claim is among the kinds of post-hiring claims that Patterson bars.[8]

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[8]This court decided Vance I when *Patterson v. McLean Credit Union* was pending before the Supreme Court. In Vance I, we saw a distinction between the constructive discharge theory of Vance's case and the "pure" harassment claims of the plaintiff in Patterson. Vance I, 863 F.2d at 1509 n. 3. But there has been an intervening change in the law that alters what some may have seen as the law of this case. See *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir.1984) ("law of the case" doctrine subject to intervening change in controlling law). After the Supreme Court's opinion in *Patterson*, no basis exists in section 1981 cases to sustain the

B. Retroactive Application of *Patterson v. McLean Credit Union*

The district court declined to apply *Patterson* retroactively based on the pragmatic and equitable considerations set out in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). We think the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, — U.S. ——, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), forecloses *Chevron Oil* analysis in this case and commands retroactive application of *Patterson*.

In *Beam*, the Supreme Court held that if the court applies a rule to the parties in the case in which the rule is announced, the rule must be applied retroactively to cases pending at the time the rule issues. "The question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equity and stare decisis here prevailing over any claim based on a Chevron Oil analysis." *Beam*, — U.S. at ——, 111 S. Ct. at 2446. Under *Beam*, the dispositive question is whether the *Patterson* court applied its interpretation of section 1981's "make and enforce" language to the parties in the Patterson case. See *Lufkin v. McCallum*, 956 F.2d 1104, 1106-07 (11th Cir.1992) (applying *Beam*).

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distinction between claims of "pure" harassment and claims which allege that acts of harassment caused the discharge of the employee. Given the sweep of the words of the *Patterson* opinion, all such claims would involve "postformation" contractual activity outside the protection of section 1981. See *Patterson*, 491 U.S. at 179, 109 S. Ct. at 2374 (Section 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.").

The Court in *Patterson* did apply its interpretation of section 1981 to the litigants there. See *Patterson*, 491 U.S. at 177-80, 189, 109 S. Ct. at 2373-74, 2379 (affirming court of appeals' dismissal of racial harassment claim as unactionable under section 1981). So, even assuming for the sake of argument that *Patterson* did [*1577] announce a new rule (as opposed to declaring what section 1981 always meant), that rule would apply to all cases then pending, such as this one.

Based on the principles announced in *Beam*, we conclude that the district court erred in refusing to apply *Patterson v. McLean Credit Union* to dismiss the section 1981 claim in this case.

C. Prospectivity of the Civil Rights Act of 1991

The remaining question is whether the Civil Rights Act of 1991 applies retroactively to overrule *Patterson* to save Vance's section 1981 claim. One effect of the 1991 Act, in cases where it applies, is to make the rule in Patterson obsolete by statutorily adding certain categories of post-hiring discrimination to the list of practices liable to suit under section 1981. In *Baynes v. AT & T Technologies, Inc.*, 976 F.2d 1370 (11th Cir.1992), we decided that section 101 has no retroactive application in cases in which entry of judgment predates the effective date of the Act.[9]

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[9]Almost every circuit that has addressed the retroactivity of the Civil Rights Act of 1991 has concluded that the 1991 Act does not apply retroactively. See *Baynes v. AT & T*, supra; *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C.Cir.1992); *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363 (5th Cir.1992), petition for cert. filed, 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-737); *Mozee v. American Commercial Marine Svc. Co.*, 963 F.2d 929 (7th Cir.), cert. denied, — U.S. ——, 113 S. Ct. 207, 121 L. Ed. 2d 148 (1992); *Hicks v. Brown*

Group, Inc., 982 F.2d 295 (8th Cir.1992) (en banc); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), cert. denied, — U.S. ——, 113 S. Ct. 86, 121 L. Ed. 2d 49 (1992). But see *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir.1992).

In *Davis*, a panel of the Ninth Circuit inferred from sections 109(c) and 402(b) of the Act that Congress did intend the Act to apply retroactively except in specific kinds of cases. Section 109 makes Title VII applicable to U.S. citizens employed in foreign countries, overruling *EEOC v. Arabian Amer. Oil Co.*, — U.S. ——, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991); section 109(c) expressly makes section 109 purely prospective. Pub.L. No. 102-166, § 109(c) (1991). Section 402(b) makes the Act inapplicable to the Wards Cove litigation. *See* Pub.L. No. 102-166, 105 Stat. 1071, § 402(b) (1991); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989); 137 Cong.Rec. S15950-968 (daily ed. Nov. 5, 1991) (Senate discussion preceding vote on section 402(b)). Considering these two provisions, the Ninth Circuit decided that to conclude the whole Act applies only prospectively would violate the general canon of construction that statutes be interpreted "so as not to render one part inoperative" and so that "no provision ... be construed to be entirely redundant." *Davis*, 976 F.2d at 1551 (citations omitted).

Recalling that there are exceptions to almost all general propositions, we cannot accept the *Davis* reasoning. The negative inference (that Congress intended general retroactivity) that the *Davis* court drew from sections 109(c) and 402(b) is an unhelpful legal fiction given the reality of a sharp conflict between legislators on the retroactivity of the Act generally. See *Davis*, 976 F.2d at 1554 (collecting citations

Because judgment in this case was entered in May 1990, before

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to legislators' divergent views). We think it makes little sense to know that Congress never acted on retroactivity and then to infer from a couple of provisions — here, distinctive provisions that made prospectiveness especially plain for certain situations — that Congress generally "envisioned" or "intended" retroactive application as a general matter. *Cf. Davis*, 976 F.2d at 1552-56.

Congress probably only intended for sections 109(c) and 402(b) to minimize, in specific instances, the risk posed by uncertain outcomes in the courts on the general retroactivity issue. *See Gersman*, supra, 975 F.2d at 890 (sections may be viewed as an "insurance policy"); *Johnson*, supra, 965 F.2d at 1373 (sections may evince no general conclusion about general retroactive application). And when a court holds that the Act generally applies prospectively, the court does not render sections 109(c) and 402(b) "entirely redundant" nor inoperative. Those sections operate to ensure that, although some court might hold the Act retroactive as a general matter, no court may hold that the Act applies in Wards Cove or in a section 109 case where the conduct predates enactment. With that understanding of sections 109(c) and 402(b), and given the abundant evidence that Congress never agreed on the retroactivity of the Act in general, but instead left that issue to the courts, e.g., compare 137 Cong.Rec. S15483-485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) with 137 Cong.Rec. S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy), we decline to infer general "intent" on retroactivity from sections 109(c) and 402(b).

the effective date of the Act,[10] the Act does not apply retroactively [*1578] to Vance's action.[11]

IV. Conclusion

The district court's order denying Southern Bell's motion for summary judgment on Count I, the 42 U.S.C. § 1981 claim, is REVERSED.

CONCUR BY: FAY (In Part)

DISSENT BY: FAY

DISSENT: FAY, Circuit Judge, concurring in part and dissenting in part:

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[10]Section 402 of the Civil Rights Act of 1991 provides that the Act took effect on its date of enactment, November 21, 1991, unless otherwise provided.

[11]We recognize that Vance's section 1981 claims went to trial despite *Patterson*, while Baynes's section 1981 claims, in contrast, fell to *Patterson* in a summary judgment. *Baynes*, 976 F.2d at 1372. But in view of all the *Bradley* factors, this distinction leads us to no different conclusion in this case about the retroactivity of the Civil Rights Act of 1991. *See Baynes*, 976 F.2d at 1373-75, applying *Bradley v. School Board of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016, 40 L. Ed. 2d 476 (1974). In addition, the principle that "litigants in similar situations should be treated the same," *Beam*, — U.S. at ——, 111 S. Ct. at 2444, dissuades us from a different view of the Act in this case.

Part I

I reluctantly concur with the majority that the existing case law compels both retroactive application of *Patterson*[1] and prospective application of the Civil Rights Act of 1991, thus eliminating Vance's § 1981 claim. The law of this circuit was settled on these two issues in *Baynes v. AT & T Technologies, Inc.*, 976 F.2d 1370 (11th Cir.1992) (per curiam).[2]

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[1]In advocating purely retroactive application of case law, (as opposed to statutes) Justice Blackmun, in *James B. Beam Distilling Co. v. Georgia*, — U.S. ——, ——, 111 S. Ct. 2439, 2450, 115 L. Ed. 2d 481 (1991) (Blackmun, J. concurring), said this policy "derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." *Id.* at ——, 111 S. Ct. at 2450 (emphasis added). But of course when we apply *Patterson* retroactively, without viewing it from the perspective of its repudiation by Congress, that is exactly what we do. We are not only applying a principle determined to be wrong, but we do so in a context where this principle was not relied upon by anybody in the case as the relevant law. It is true, as Justice Blackmun points out, that courts with the option to apply new rules prospectively only "dodge the stare decisis bullet," and perhaps are thereby encouraged to disrupt "settled expectations" more often. *Id.* at ——, 111 S. Ct. at 2450. However, it hardly advances his concern for settled expectations to apply a law retroactively that was not only contrary to those settled expectations, but is also now repudiated. Such a circumstance should be an exception to the general rule.

[2]In my view, the majority perhaps too hastily dismisses, in footnote 11 of its opinion, the circumstances of this case which distinguish it from *Baynes*. I would be inclined, for all of the reasons noted in this opinion, to find the distinction noted by

Nevertheless, I cannot help but feel that the application of the rules articulated in *Baynes* lead, in Mary Ann Vance's case, to a manifest injustice. Two all-white juries, on two separate occasions, have heard all of the evidence and concluded that Southern Bell discriminated against Mrs. Vance and awarded her multi-million dollar verdicts on her claim. We reversed her first verdict as excessive three months before the decision in *Patterson* was announced. Now, her second verdict is ground to dust between the upper millstone of the decision not to apply the Civil Rights Act of 1991 to her case, and the lower millstone of *Patterson*, a decision on which no one in this case could be said to have relied.[3] Much of [*1579] what I could say on the

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the majority as dispositive, entitling Vance to affirmance of her verdict. Nor do I believe that this result would offend the principles in *Bradley*. However, *Bradley* is not the only applicable precedent, and *Bowen* would compel the opposite result. Although this Circuit has in general cleaved to the *Bradley* rule, *see, e.g., Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815, 818 n. 4 (11th Cir.1991) (per curiam), we are not free to disregard Bowen. See *Litman v. Massachusetts Mutual Life Ins. Co.*, 825 F.2d 1506, 1509 (11th Cir.1987) (en banc). In the absence of more guidance from the Supreme Court as to the choice between *Bradley* and *Bowen,* it is impossible to say that the majority's conclusion is clearly wrong, even if I disagree with its interpretation of what *Bradley* requires in this case.

[3]There is no dispute that the discrimination and harassment of which Southern Bell was accused, was, is and always has been illegal, irrespective of any retroactivity given to either the Civil Rights Act of 1991 or *Patterson*. The only thing altered by these two changes in the law was the nature of the remedy — that is, the availability of damages beyond

fairness question has already been said by others, so I will not belabor the point here. See, *e.g.*, *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929, 940 (7th Cir.1992) (Cudahy, J. dissenting).[4] I would add only that, for me, this application of

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the relatively limited equitable remedies provided by Title VII. (In other circumstances we have held that changes in the law affecting only the remedy are applied retroactively. *See, e.g., Birnholz v. 44 Wall Street Fund, Inc.*, 880 F.2d 335, 339 (11th Cir.1989) (per curiam)). Thus, it cannot be said that anyone in this case relied on *Patterson*, either for knowledge of what the law prohibited or for estimating liability in the event the law was broken. As Justice Scalia noted in his concurrence in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840, 110 S. Ct. 1570, 1579, 108 L. Ed. 2d 842 (1990) (Scalia, J. concurring): "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Id.* at 855, 110 S. Ct. at 1586.

[4]What Judge Cudahy wrote there is equally true of this case. "*Patterson* was the effective law of the land at no time that is relevant to the disposition of this case. No one relied upon it when liability was incurred in this case, nor can we rely on it now that it has been overruled by Congress." *Mozee*, 963 F.2d at 941 (Cudahy, J. dissenting).

Other objections which could be raised to the majority's reasoning have been discussed in great detail by Judge Fletcher of the Ninth Circuit in her majority opinion in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir.1992) and by Judge Wald of the D.C. Circuit in her dissent in *Gersman v. Group Health Assoc.*, 975 F.2d 886, 900 (D.C.Cir.1992) (Wald, J. dissenting). However, these

Patterson also raises troubling questions of separation of powers.

In *Patterson* the Supreme Court was engaging in statutory interpretation, not constitutional interpretation, when it interpreted § 1981 to preclude the cause of action upon which Vance has relied. Theoretically, the Court's role in statutory interpretation is to uphold legislative intent, not to make new law. Nevertheless, new interpretations of statutes often have that practical effect, as Patterson did when it sub silentio overruled prior court of appeals opinions (such as our own)[5] interpreting § 1981 more expansively. Judicial "law making" is an inevitable byproduct of our system,[6] albeit one that, at times, seems to be barely tolerated — like a relative you'd rather not

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interpretations have not been adopted by this circuit.

[5]*See, e.g., Vance I*, 863 F.2d at 1509 n. 3 (citing cases holding that the legal elements of disparate impact cases are identical under Title VII and § 1981).

[6]*See James B. Beam Distilling Co. v. Georgia*, — U.S. ——, ——, 111 S. Ct. 2439, 2449, 115 L. Ed. 2d 481 (1991) (White, J. concurring) (criticizing what he took to be Justice Scalia's suggestion that although judges do "make" the law in a real sense they ought to pretend that they do not). But *see id.*, at ——, 111 S. Ct. at 2451 (Scalia, J. concurring in the judgment) (defending the traditional stance that courts "find" the law not "make" it as one of the checks on judicial decision-making that forms an integral part of the constitutional separation of powers). Notably, although the majority relies on Beam for its retroactive application of *Patterson*, in *Beam* the Court was dealing with the retroactive application of its interpretation of constitutional law — an area given over almost exclusively to the courts. In contrast, *Patterson* was a judicial interpretation of a statute.

acknowledge — because it is difficult to square with the theory of the courts' role. But whatever theoretical difficulties judicial law making poses in the ordinary course of things, the practice is more troubling still when Congress rejects the Supreme Court's interpretation of a statute. It is difficult to argue then that the court is merely effectuating the Congress' intent. In that case, I would think our constitutional role is to limit the operation of that erroneous interpretation, not expand it.

To keep *Patterson* on "life support" by applying it to cases beyond those tried in reliance upon it, like Baynes, or for which it provided the governing standard at the times the acts occurred, makes the Court's reassurance in *Patterson*, that "Congress remains free to alter what we have done," ring hollow. *Patterson*, 491 U.S. at 173, 109 S. Ct. at 2370. Whatever Congress' intent on retroactivity,[7] it is clear Congress intended to alter what the Court had done. Disregarding that aspect of the legislative intent and focusing exclusively on the intent with regard to retroactivity might well be viewed as a refusal to implement Congressional will or as not reflecting the appropriate respect for our co-equal branch.

[*1580] Finally, while I share the majority's concerns for equity and stare decisis, it is far too late in the day to ensure that everyone similarly situated will be treated equally with respect to § 1981.[8] Moreover, consistency is only one of many values with

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[7]The majority in *Gersman* aptly noted that looking at the legislative history of the Civil Rights Act of 1991 provides no guidance on the issue of Congress's intent regarding retroactivity. 975 F.2d 886, 890-92 (D.C.Cir.1992).

[8]*Cf. Baynes* (*Patterson* bars 1981 claim) with *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1497 (11th Cir.1990) (en banc) (*Patterson* does not bar 1981 claim because not timely raised by defendant, even though *Patterson* had not been

which we must be concerned. As we have said elsewhere, "'justice is better than consistency.'" *Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir.1984) (citations omitted).[9] Nevertheless, while I believe that upholding Vance's verdict in this case would be just, I cannot say that the majority has misread the precedent or has clearly erred, therefore I concur in its ruling.

Part II

I cannot join the majority in its assessment of Vance's state law claim. See majority opinion supra at n. 7. The District Court decided that the tort of intentional infliction of emotional distress "is incident specific,"[10] and that as the judge found "no

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decided at time of trial), and *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1519 (11th Cir.1991) (remanded in light of *Patterson*, even though defendant did not argue that case at trial, because plaintiff did not argue that defendant had waived his right to argue *Patterson* on appeal by failing to raise it below).

[9]Even where the law has not undergone such rapid and dramatic shifts, as has the interpretation of § 1981, our system of adjudication tolerates a great deal of disparity of outcome, most notably via the jury system itself, but also through the operation of the doctrines of res judicata, collateral estoppel and the law of the case.

[10]Because the District Judge ruled orally on Southern Bell's motion for a directed verdict at the close of the plaintiff's case it is not clear what precedent he was relying on for this ruling. However, whatever that precedent it would seem to be discredited by the Florida Supreme Court's ruling in *Byrd v. Richardson- Greenshields Securities, Inc.*, 552 So. 2d

incident subsequent to July of '85," the statute of limitations barred Vance's claim. That ruling is erroneous. Under the Federal Rules of Civil Procedure Vance's amended complaint relates back to her original filing because there is no question that the basis for her claim of intentional infliction of emotional distress arises out of the same "conduct, transaction, or occurrence" as her § 1981 claim. Fed. R. Civ. Pro. 15(c).[11] See also *Forzley v. Avco Corp.*, 826 F.2d 974, 981 (11th Cir.1987). Southern Bell's argument to the contrary is simply spurious.[12]

1099 (Fla.1989). Although the Florida Supreme Court did not address this question directly, its discussion obviously reflects an understanding that such claims need not be "incident specific" in the sense that each incident, taken alone must meet the outrageousness standard. This understanding is also consistent with our own previous statement in *Vance I*. "A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits." 863 F.2d at 1511.

[11]The version of Rule 15(c) effective at the time Mary Ann Vance amended her pleading read as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

[12]Southern Bell's argument that the claims are factually distinct is confined to the following statement in its brief. "The distinctions between these claims are too numerous to list in an appellate brief. Suffice it to say they concern totally

The only thing that is changed by Vance's amended complaint is some of the legal inferences to be drawn from the same conduct. Vance's amendment does not so vary from her original complaint that Southern Bell did not have notice as to the facts alleged or the evidence which would be relevant. Southern Bell cannot reasonably assert that it was prejudiced by her amendment. Indeed, because of the change in the law, if anyone is prejudiced it is Vance. Therefore, she ought to be allowed the opportunity to amend her complaint to assert a claim that she understandably did not assert before, as long as Southern Bell was given "fair notice of the [*1581] general fact situation out of which" her claim arose. *Forzley*, 826 F.2d at 981 (citation omitted).

As the United States Supreme Court noted in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990) in a related context:

> Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleading or develop the record more fully.

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distinct subject matter, and are not even similar in genesis, as one is statutory and the other arises at common law." Appellant/Cross- appellee's Brief at 49. Suffice it to say, the appellant's conclusions do not strike me with the crystal clarity appellant believes they possess.

Id. at 482, 110 S. Ct. at 1256 (emphasis added) (citations omitted). This quote reflects the liberal amendment policy that has been the practice of the federal courts. See also Comments to 1991 amendments of Rule 15(c) ("Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.") (indicating that, notwithstanding the supremacy of federal procedural rules in federal court, the courts are to use whichever rule allows more liberal relation back).

The District Court also ruled as a matter of law that Vance's claims did not rise to the level of "outrageousness" necessary to support her claim. The Florida Supreme Court has stated the necessary standard as follows:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Eastern Airlines, Inc. v. King, 557 So. 2d 574, 576 (Fla.1990) (quoting Restatement (Second) of Torts, § 46 (1965), comment d). If the conduct which two juries found that Southern Bell engaged in does not meet this standard I can scarcely conceive of the case which would.

The question of whether a complaint will support a cause of action sufficient to go to the jury on the issue of intentional infliction of emotional distress is initially one for the judge. But the district court judge in this case did not appear to correctly apply the standard employed by the Florida courts.

> Whether the conduct is outrageous enough to rise to the level required by the tort may be decided as a question of law when the facts of a case can under no conceivable interpretation support the tort, but where significant facts are disputed, or where differing inferences could reasonably be derived from undisputed facts, the question of outrageousness is for the jury to decide.

Williams v. Minneola, 575 So. 2d 683, 692 (Fla. Dist. Ct. App. 1991) (citations omitted). See also *Mundy v. Southern Bell Tel. & Tel. Co.*, 676 F.2d 503, 505 n. 4 (11th Cir.1982) (per curiam) (degree of outrageousness is a mixed question of law and fact). Cf. *McAlpin v. Sokolay*, 596 So. 2d 1266, 1269-70 (Fla. 5th App. 1992) (holding that question is one for the court, but nevertheless reversing trial court's dismissal of claim, suggesting that standard for the judge is whether any reasonable juror could find the conduct sufficiently outrageous); with *Baker v. Florida National Bank*, 559 So. 2d 284, 287 (Fla. 4th App. 1990) (question is one for the court, no elaboration on standards to guide judge). There is no question that there were disputed facts in this case,[13] quite apart from [*1582] the issue of whether the facts could under "no conceivable interpretation support the tort"[14] as would seem necessary to support the district judge's

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[13]Even at this late stage in the litigation Southern Bell continues to dispute the facts and attempts to relitigate them.

[14]This would be the case were Florida to have an employment, or other, "exception" to the intentional infliction of emotional distress cause of action. In every such case you would have a failure to state a cause of action on the face of the complaint because "no conceivable interpretation" of the facts could support the tort because of the exception. Even though no such "exception" is articulated, a de facto exception appeared to exist prior to 1989, in that employees seldom won

directed verdict.

Although the transcript does not reveal the authority on which the district court relied, the majority opinion cites only two[15] cases to support this ruling; *Lay v. Roux Laboratories, Inc.*, 379 So. 2d 451, 452 (Fla. Dist. Ct. App. 1980) (per curiam), and *Mundy*, 676 F.2d at 505-506. I fail to see how either of these cases support this position. Not only are both cases over 10 years old,[16] (a point to which I will return later), neither can be said to stand for much beyond its own facts.

In *Lay* a Florida court of appeals merely determined that the facts in that case would not sustain a claim of intentional infliction of emotional distress.[17] The plaintiff claimed that her

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such cases. This is the proposition for which the majority cites *Mundy*. However, that is clearly no longer the state of the law in Florida.

[15]It further cites *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1007 (11th Cir.1986) for the proposition that "this court is bound by decisions of Florida's intermediate courts of appeal absent 'some persuasive indication that the state's highest court would decide the issue otherwise.'" See majority opinion supra n. 7. In this case, I believe there is such a "persuasive indication."

[16]The majority's reliance on these precedents is not dubious merely because the precedents are old, some of our most venerable principles are articulated in cases hundreds of years old. Rather, the cases on which it relies are of diminished value in light of the changes in the law. This reliance is even more surprising because there is no dearth of more current case law.

[17]While it is always possible to argue that a case is limited to its facts, in some cases it is a fairer reading than others. In the court gave no hint that its ruling was to extend beyond the

supervisor threatened her with the loss of her job and "'began using humiliating language, vicious verbal attacks, racial epithets and called [her] a "nigger"' when an argument arose concerning a parking space." *Id.* at 452. There is no indication in the recitation of the facts that any more than this single altercation was at issue there, or that any pattern of harassment was alleged. This is a far cry from the pattern of conduct in which Vance alleged that Southern Bell engaged. *Lay* cannot reasonably be read to hold that racially hostile misconduct can never support a claim of intentional infliction of emotional distress, and if it can not be so read I fail to see how it supports the district court's ruling.

Mundy is of even less value to the majority. *Mundy* is precedent from this circuit.[18] At that time it was not even clear "whether Florida recognized an independent cause of action for intentional infliction of emotional distress," *Mundy*, 676 F.2d at 505, let alone what sort of conduct would meet the standard. The majority suggests that the relevance of *Mundy* is that Florida rejects this cause of action in the employment context based on this court's survey of Florida precedent. In an aside the panel in

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very limited facts of the case. Because, factually, the two cases do not appear similar, *Lay* is of little value to anticipating how a Florida court would view Vance's claim.

[18]The federal courts' interpretation of Florida law in the face of ambiguity, must necessarily give way once the state's highest court removes that ambiguity. Of course, determining when an ambiguity exists is no easy task. Thus, "federal courts looking to Florida law have arrived at various conclusions about where this state stands on the issue [of intentional infliction of emotional distress]. Often citing to the same cases, it has been said that Florida recognizes the cause of action, does not, or has not made up its mind." *Dominguez v. Equitable Life Assur. Soc.*, 438 So. 2d 58, 59 n. 2 (Fla. Dist. Ct. App. 1983) (citations omitted).

Mundy observed that, "although there are numerous Florida cases in which plaintiffs have made claims of intentional infliction of emotional distress against their former employers ... we find none, in which the plaintiff has prevailed." *Id.* at 506. This is not only far short of a pronouncement that employees could never recover on this theory, it is also no longer true.

[*1583] Since *Mundy* was decided the law has undergone rather significant expansion by the Florida Supreme Court. First, in *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla.1985) the supreme court clarified that intentional infliction of emotional distress was indeed a separate cause of action. Later, in *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099, 1103-04 (Fla.1989) the court held workers could sue their employers for sexual harassment under a theory of intentional infliction of emotional distress.[19] *Id.* at 1104. Thus, in *McCarson* and *Byrd*, the Florida Supreme Court clarified the question in *Mundy* and provided an example from the state's highest court that an employee could sue under this theory.[20]

Justice Barkett, writing for the majority in *Byrd* found that "public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law." *Id.* She based this conclusion on the extensive state and federal civil rights legislation, as well as

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[19]The principal holding of the case was that the workers' compensation exclusivity rule did not preclude the maintenance of a separate cause of action for job-related sexual harassment.

[20]*Byrd* also rendered *Studstill* obsolete because the substantive holding in *Studstill* was that sexual harassment suits were barred under Florida law by the workers' compensation exclusivity rule. *Id.* 806 F.2d at 1007-08.

Supreme Court precedent, which addressed sexual harassment or had been interpreted to encompass it. *Id.* at 1102-04.

Given that the recognition of sexual harassment as an injury to civil rights is of relatively recent vintage, (compared to racial harassment), I find it unlikely that under current Florida law Vance's claims would be deemed too insubstantial to support her claim. Every factor cited by Justice Barkett which supported the finding in *Byrd* applies with equal, if not more, vigor to racial harassment, if only because the public policy condemning racism is of even longer standing.[21]

Mary Ann Vance testified to a continuous and oppressive pattern of intimidation and harassment on the part of her fellow workers and supervisors at Southern Bell. That Southern Bell would allow such an atmosphere to develop, or having been apprised of it, fail to take the firmest possible steps to eradicate it, is by itself outrageous. But of all of the incidents, two stand out as particularly horrific — the nooses twice left at Vance's work station. The noose in this context is a symbol not just of racial discrimination or of disapproval, but of terror. Those of us for whom a particular symbol is just that — a symbol — may have difficulty appreciating the very real, very significant fear

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[21]This fact is relevant to the extent that the standard is supposed to be gauged by the standards of the average member of the community. Presumably, the longer the particular behavior has been societally condemned, the more likely that behavior is to provoke the outraged response. Sadly, this assumption may be more of a projection of what we think the average member of the community "ought" to think rather than what he or she does think. "Outrageousness is not only highly subjective, but also an extremely mutable trait.... Most of the examples contained in the Restatement comments do not overwhelm the reader with their 'atrociousness' and 'utter intolerability'...." *Williams v. Minneola*, 575 So. 2d 683, 692 (Fla. 5th Dist. Ct. App. 1991).

that such symbols inspire in those to whom they are targeted. No less than the swastika or the Klansman's hood, the noose in this context is intended to arouse fear.[22] If a jury would not cry "Outrageous!" upon hearing these facts (and I think these juries did through their verdicts), I cannot think of a set of facts for which it would.

For all of the foregoing reasons I believe we should remand this case for retrial on the state law claim, and therefore I respectfully DISSENT. Subject to my reservations expressed in Part I, I CONCUR in the majority's resolution of Vance's § 1981 claim.

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[22]It cannot be said, even today, that Black Americans are free to disregard threats of racial violence as idle ones.

APPENDIX II-A

Vance v. Southern Bell Telephone and Telegraph Co.,
863 F.2d 1503 (11th Cir. 1989)

Mary Ann VANCE, Plaintiff-Appellant
v.
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,
a Georgia Corporation, Defendant-Appellee,
Joyce Foskey, et al., Defendants

VANCE v. SOUTHERN BELL TEL. & TEL. CO.

No. 87-3625

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

863 F.2d 1503; 1989 U.S. App. LEXIS 561; 50 Fair Empl. Prac. Cas. (BNA) 742; 48 Empl. Prac. Dec. (CCH) P38,626

January 23, 1989

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida.

COUNSEL: Charles Cook Howell, III, Michael S. O'Neal, Jacksonville, Florida, Gardner Davis, Scott Fortune, Jacksonville, Florida, Attorneys for Appellant.

Guy O. Farmer, II, Esquire, Jacksonville, Florida, Daniel J. Thompson, Esquire, General Attorney, Atlanta, Georgia, Attorneys for Appellee.

JUDGES: Hill and Fay, Circuit Judges, and Davis, * District Judge.

* Honorable Edward B. Davis, U.S. District Judge for the Southern District of Florida, sitting by designation.
OPINION BY: FAY

OPINION: [*1505] FAY, Circuit Judge:

Plaintiff-appellant Mary Ann Vance appeals the district court's order granting the defendant Southern Bell Telephone and Telegraph Company's motion for judgment notwithstanding the verdict ("JNOV") and in the alternative for a new trial. *Vance v. Southern Bell Tel. and Tel. Co.*, 672 F. Supp. 1408 (M.D.Fla. 1987). A jury awarded Vance compensatory and punitive damages after a four day trial based on the plaintiff's claim that her employer, Southern Bell, discriminated against her on the basis of race in violation of 42 U.S.C. § 1981 (1982). The district court judge found that reasonable jurors could not have arrived at a verdict for the plaintiff, and granted the defendant's motion for JNOV. In addition, the court held that had it not granted the JNOV, it would have granted the defendant a new trial, because the relief provided by the jury was contrary to [*1506] the great weight of the evidence, and because the damages awarded were grossly excessive. On appeal, the plaintiff contends that the JNOV and the alternative grant of a new trial were improper, because the jury verdict was supported by substantial evidence. After a thorough review of the record, we reverse the order granting the defendant's motion for JNOV. However, we affirm the district court's alternative holding granting a new trial.

I. Background

Plaintiff Mary Ann Vance, a black woman, began working for Southern Bell in March, 1972, as a switchboard operator. Thereafter, she held various jobs at other Southern Bell locations throughout Jacksonville, Florida. Although Vance missed some time from work due to illness, she generally had a good employment record. In 1984, Vance bid for a job at Southern Bell's Western Way facility in Jacksonville as a material services coordinator. The job provided higher pay, but was considered a step down in job classification because it entailed work in a warehouse. Prior to her transfer to Western Way,

Vance had never complained of any racial discrimination at Southern Bell.

Vance began work at the Western Way facility on August 13, 1984 in the CONECS department under the supervision of Paul Wagner, a first-level supervisor. About a week after Vance began work in this department, she found what appeared to be a noose hanging from the light fixture above her work station. At the time of this incident there were several "imports," or temporary personnel working at Western Way. At trial, Vance testified that Clyde Oliver, a white co-worker, saw the noose and told one of the imports to take the noose down. When the defendant called Oliver as a witness, he denied ever having seen the noose. On rebuttal, Vance called a black co-worker, Roland Ball, who said that Vance had brought him to see the noose, that Oliver had seen it also, and that Ball took it down and discarded it. Two days later, the plaintiff again found the noose hanging from her light fixture. This time, she removed it herself and threw it in the trash. Neither Vance nor Ball reported the incidents to any Southern Bell official at that time.

Mrs. Vance first mentioned the noose incidents to management on January 9, 1985, over four months later, at a grievance hearing concerning a separate incident. At trial, there was greatly conflicting testimony as to what statements were made at this hearing. Vance mentioned the noose incidents to Nancy Murray, Southern Bell's Personnel Manager, and Murray then asked Bert Sellars, the manager of the Western Way warehouse, whether he knew anything about the noose. Both Vance and Levi McClendon, a black union steward who was present at the hearing, testified at trial that Sellars responded that Paul Wagner had done it "to increase productivity."[1] Notes

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[1]The district court found it "obvious that the remark regarding an increase in productivity related to the fact that Mr. Wagner had made the device; not that he hung it over the

taken by Nancy Murray at the meeting stated, "In CONECS she found a noose. Paul probably did . . ." (R.7-173) However, Sellars denied having made the statement, and Nancy Murray maintained that it was Vance, not Sellars, who mentioned Wagner's name in connection with the noose. At trial, Wagner testified that he had constructed a device which looked like a noose made of hemp rope with a braided loop on one end, but that it had been designed to desheathe cable to increase productivity.

On September 9, 1984, Vance was transferred from the CONECS department to the Repair and Returns department where her first-level supervisor was Walter Stembridge. Vance alleged that during this time, Stembridge and some of Vance's co-workers discriminated against her by purposefully denying her the training necessary to do her job. She testified that Joyce Foskey Blackwood, the "working leader" of the group who was responsible for training Vance, refused to answer Vance's questions as to how to do her job. Vance also claimed that some of her work had been sabotaged by an unknown employee. [*1507] Stembridge, however, testified that Vance had received essentially the same training as everyone else. Twice Stembridge brought in outside people to train the entire section. Vance further testified that she wrote a letter to the warehouse manager, Bert Sellars, asking to be transferred, but she was not moved. Sellars admitted that he had heard of Vance's complaints of inadequate training.

On September 18, 1984, Tommy Lee Sampson, a black manager of employment and selections, contacted Vance about an allegation that she had omitted information on an employment questionnaire concerning a traffic violation that had occurred three years earlier. Vance explained that she had misunderstood the form, believing that a traffic ticket did not

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Plaintiff's workbench." *Vance*, 672 F. Supp. at 1410.

count as a "conviction" which had to be reported. Although he testified that he was unable to determine whether or not Vance's omission was intentional, Sampson suspended Vance for two days without pay. He eventually reduced the suspension to a warning entry on Vance's record, but she was not reimbursed for the two days' pay. Vance alleged that several other black employees were suspended for similar omissions, but that Clyde Oliver, a white employee, was treated differently because of his race. Oliver received a written warning for failing to report a conviction for stealing gasoline when he was sixteen years old. Sampson explained that he did not suspend Oliver for this omission because the crime had occurred about twenty years earlier.

On October 16, 1984, a grievance hearing was held concerning the discipline Vance received for the traffic ticket omission. At this hearing, Vance became upset and cried. Upon returning to her work station at the Repair and Returns department, Vance had an altercation with Joyce Foskey Blackwood. Once again, there is conflicting testimony as to what was said and done, but it is clear that Vance struck Blackwood during the argument. Bert Sellars and Walt Stembridge suspended both women for one and one-half days without pay. Vance testified that she told Sellars that there was a "black-white situation" between her and Blackwood, and that Sellars responded by saying, "I'm giving you a direct order. Do not repeat that again." (R.7-298-99). Both Blackwood and Vance grieved their suspensions. After investigating the incident, Sellars and Stembridge decided to rescind Blackwood's suspension and give her back pay. Vance's discipline was not rescinded. The defendant maintains that its investigations showed that Vance had struck Blackwood, but that Blackwood had not struck Vance, and that this was the reason for the disparate treatment. Vance testified that the investigation was biased because the investigators relied solely on the account of the incident given by Norma Brown, a good friend of Blackwood, who told the investigators that Vance had been at fault. Brown was the only eyewitness to the altercation. Vance told the

investigators that Blackwood had struck her first, and claims that the investigators discounted her story, despite the fact that Brown's credibility should have been suspect because there had been bad blood between Vance and the two women.

On November 15, 1984, Vance suffered an anxiety attack shortly following an incident in which Vance claimed that someone had sabotaged a pay phone which she was repairing. She testified that her body went numb from the waist down and she collapsed in the ladies room. Thereafter, Stembridge, a co-worker Mary Smith, and a paramedic entered the ladies room to assist her. Vance said that Smith had spoken to Vance's doctor, Dr. Rosin, who told Smith to have Vance brought to the emergency room at Baptist Hospital as soon as possible. Vance claims that Smith had relayed this information to her while Stembridge was with them in the restroom. Stembridge drove Smith and Vance to Memorial Hospital instead, which Vance claims was an act of racial harassment. Vance testified that she asked Stembridge several times in the car to take her to Baptist, but that Stembridge intentionally ignored her. Stembridge denied having heard Vance or anyone else ask him to go to Baptist instead of Memorial, and claimed that he took Vance to Memorial because he believed it was the facility that the company [*1508] normally utilized for emergency treatment of employees.

About a week before this anxiety attack, Dr. Rosin wrote a letter to Southern Bell concerning the "undue pressure and harassment on her job" which she had told him she was suffering. The plaintiff argued that Stembridge brought her to the wrong hospital, to avoid seeing Dr. Rosin and verifying his concerns. The district court ruled that this was an unreasonable inference, since it was not clear that Stembridge had ever seen the letter from Dr. Rosin.

After the anxiety attack, Vance was out on sick leave, with full pay, from November 15, 1984 until January 10, 1985. On

January 9, 1985, Vance returned to the warehouse and attended the grievance hearing concerning her discipline stemming from the incident with Joyce Foskey Blackwood. It was at this meeting that Vance first mentioned the noose incidents to Southern Bell management. On behalf of Vance, the union requested that her suspension be rescinded as Blackwood's had been, but Southern Bell denied this request because of its determination that Vance had thrown the first and only blow during the altercation. Southern Bell offered to reduce Vance's suspension to one-half day if Vance would drop a complaint she had brought against the company with the Jacksonville EEOC ("JEOC"). Vance's union representative was willing to accept the proposal, but Vance refused. Her discipline remained as initially given.

The plaintiff claims that Southern Bell's proposed settlement offer amounted to racial discrimination, in that she was asked to drop her JEOC complaint which was unrelated to the grievance hearing, and which itself included a charge of racial discrimination. At trial, Nancy Murray, the company's staff manager of labor relations, testified that such settlement offers are routine, regardless of the substance of the JEOC complaint and the race of the party involved.

Vance also alleges that Southern Bell's refusals to grant her requests for transfer to a different department at Western Way, and later for transfer to a different Southern Bell facility, were motivated by racial discrimination. After her anxiety attack, Vance began seeing Dr. Ruffett, a clinical psychologist, and Dr. Stamm, a psychiatrist. On November 19, 1984, Dr. Ruffett wrote a letter to Southern Bell stating that Vance should be assigned to a new department upon her return to work because of the stress she was experiencing on the job. The union stated this position to Southern Bell at the January 9, 1985 grievance hearing, but Nancy Murray informed Vance that the request had been denied. On March 14, 1985, Vance was transferred to the PICS

department, and on July 26, 1985 she was transferred again to the Preterm department.

Thereafter, Vance submitted a number of letters to Southern Bell from Dr. Ruffett recommending that she be transferred to a position outside the Western Way facility for health reasons. On October 8, 1985, Vance delivered to Sellars an Employee Request for Lateral Inter-Company Movement, with a letter from Dr. Ruffett attached. Some days later, Vance stopped working at Western Way. She testified that this was in accordance with Dr. Ruffet's instructions.

Vance was contacted by the company in March 1986 about a position as an operator outside of the Western Way facility. Although she had previously performed this job, she was required to take a test, which she failed. In March 1987, she was offered a position as a clerk at Western Way, but she turned it down. Vance alleges that she never received any other offers to return to work, although many positions throughout Jacksonville were available. Vance brought this action on March 27, 1986, under 42 U.S.C. §§ 1981, 1985(3) and 1986 (1982). On April 6, 1987, before commencement of the trial, Vance dropped her claims against the originally named individual defendants. At the close of the plaintiff's case, she moved to dismiss the counts alleging violations under 42 U.S.C. §§ 1985(3) and 1986. The jury trial proceeded against Southern Bell solely on the [*1509] basis of § 1981.[2] The jury returned a verdict for the plaintiff

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[2]42 U.S.C. § 1981 (1982) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

awarding $ 42,000 for past lost wages and benefits, $ 500,000 for future lost wages, $ 500,000 for mental distress, emotional harm or humiliation, $ 3,700 for medical expenses, and $ 2.5 million in punitive damages.

II. Standard of Review

In considering a motion for JNOV, the court should view all of the evidence, together with all logical inferences flowing from the evidence, in the light most favorable to the non-moving party:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. . .

Neff v. Kehoe, 708 F.2d 639, 641-42 (11th Cir. 1983) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)).

The plaintiff in a racial discrimination case can establish a violation of Title VII or § 1981 by showing that the work environment is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . ." *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (quoting *Rogers v. EEOC*, 454 F.2d

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> shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972)).[3] The plaintiff must prove that the discrimination is intentional. See *Baldwin v. Birmingham Bd. of Educ.*, 648 F.2d 950, 954 (5th Cir. Unit B March 1981).

The Supreme Court established the framework for analyzing discrimination claims under § 1981 in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449 (11th Cir.1987). The

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[3]We reject the defendant's contention that the district court's order for JNOV must be affirmed because racial harassment claims are not covered by § 1981. Appellee's reliance on *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir.1986), cert. granted, 484 U.S. 814, 108 S. Ct. 65, 98 L. Ed. 2d 29 (1987) is misplaced. In *Patterson*, the court contrasted the language of Title VII, which prohibits discrimination with respect to the "terms, conditions or privileges of employment" with § 1981's prohibition of discrimination in "the making and enforcement of contracts." We need not reach the issue of whether § 1981 covers "pure" harassment claims, because Vance presented evidence that the harassment caused her to stop working at Western Way, thereby impairing her ability to make and enforce her employment contract.

Furthermore, we have held that the legal elements of a disparate treatment claim are identical under Title VII and § 1981. *Lincoln v. Board of Regents of Univ. Sys.*, 697 F.2d 928, 935 n.6 (11th Cir.), cert. denied, 464 U.S. 826, 104 S. Ct. 97, 78 L. Ed. 2d 102 (1983); *see also Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir.1986) (Showing a discriminatory and hostile work environment would establish a successful case under §§ 1981 and 1983. "When these statutes are used as parallel causes of action with Title VII, they require the same proof to show liability.").

plaintiff has the initial burden to present a prima facie case of racial discrimination. The burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the alleged discriminatory behavior. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 1096, 67 L. Ed. 2d 207 (1981). Should the defendant produce a legitimate reason, the plaintiff must then prove by a preponderance of the evidence that the presumptively valid reason offered by the defendant was not the true reason, but rather was merely a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804-05, 93 S. Ct. at 1825.

[*1510] **III. Sufficiency of the Evidence**

The first case which recognized a cause of action based upon a discriminatory work environment was *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972). In that case the court held that a Hispanic employee could establish a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., by showing that her employer created "a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238. The court determined that an individual's state of psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII. Since *Rogers*, several courts have adopted this position, finding that an employer violates Title VII "by creating or condoning an environment at the workplace which significantly and adversely affects an employee because of his race or ethnicity, regardless of any other tangible job detriment to the protected employee." *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987).

In *Henson*, this court applied the *Rogers* interpretation of Title VII in a sexual harassment case. However, we made it clear in *Henson* that not all workplace conduct that may be described

as harassment affects a "term, condition, or privilege" of employment within the meaning of Title VII:

> [The harassment] must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances.

Henson, 682 F.2d at 904. *See also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67, 106 S. Ct. 2399, 2405-06, 91 L. Ed. 2d 49 (1986) (citing *Henson* with approval).

In the order granting JNOV in this case, the district court ruled that the evidence concerning the noose incidents, viewed in the light most favorable to the plaintiff, established that a noose was hung over Vance's work station on two occasions, but that the plaintiff had presented no evidence as to who hung the noose on either occasion. Regarding each of the other alleged incidents of discrimination, the trial court ruled that the plaintiff either failed to make out a prima facie case, or that the defendant provided a legitimate, nondiscriminatory reason for its conduct which the plaintiff failed to rebut. Thus, the court granted the motion for JNOV, stating that "two incidents are not enough to establish that the alleged harassment was a persistent, pervasive practice." *Vance*, 672 F. Supp. at 1413.

We believe that the trial court incorrectly applied the "pervasiveness" standard outlined in Henson and Meritor. Those cases held that an actionable harassment claim must establish by the totality of the circum-stances, the existence of a hostile or abusive working environment which is severe enough to affect the psychological stability of a minority employee. The prima facie showing in a hostile environment case is likely to

consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment. It is important to recognize that in assessing the credibility and weight of the evidence presented, the jury does not necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.

We stress also that the determination of whether the defendant's conduct is sufficiently "severe and pervasive" to constitute racial harassment does not turn solely on the number of incidents alleged by the plaintiff. In a recent hostile environment harassment case, the Sixth Circuit explained that drawing a formal line between "isolated incidents" and a "pattern of harassment" is not helpful to the analysis:

> [*1511] The plaintiff need not prove that the instances of alleged harassment were related in either time or type. Rather, all that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.

Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988). Thus, in order to determine whether a hostile environment is severe enough to adversely affect a reasonable employee, the law requires that the finder of fact examine not only the frequency of the incidents, but the gravity of the incidents as well.

By contrast, the district court in the present case used a two-step analysis to determine whether the plaintiff's evidence was sufficient to withstand the defendant's motion for JNOV. First, the district court examined each individual allegation of discrimination in turn, and found that the plaintiff had made out

a prima facie case of discrimination only as to the two noose incidents. Next, the court held that two incidents of discrimination are too few, as a matter of law, to establish a harassment claim under § 1981.

Both prongs of the analysis are incorrect. First, as we stated in *Henson*, the severity of the harassment is to be determined by the totality of the circumstances. *Henson*, 682 F.2d at 904. It was thus incorrect for the district court to require that the plaintiff establish a prima facie case of discrimination as to each individual allegation that the jury could properly consider. A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits. Second, the totality of the circumstances necessarily includes the severity,[4] as well as the number, of incidents of harassment. It is thus incorrect to apply mechanically an absolute numerical standard to the number of acts of harassment which must be committed by the defendant before a jury may reasonably find that a hostile environment exists.

We find that the trial court erred in ruling that no reasonable jury could have found that the plaintiff was the victim of racial harassment within the scope of § 1981. As the district court noted, the plaintiff produced substantial evidence that a noose was twice hung at her work station. The jury could also have found that Vance was discriminated against with respect to the discipline she received for failing to mention the traffic ticket on her transfer application, and for the altercation with her co-worker Joyce Foskey Blackwood. Regarding the incident involving Vance's transportation to the wrong hospital by her supervisor, Mr. Stembridge, the court found that it was

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[4]It is hard to imagine an incident of this sort taking place in 1984. The grossness of hanging an object resembling a noose at the work station of a black female is self-evident.

"inconclusive" as to whether he had heard Vance's request to be brought to Baptist Hospital, and that even if he did, he offered a legitimate explanation for his action. Whether Stembridge actually heard Vance's request, and if he did, whether his explanation for not honoring her request was legitimate or pretextual, are both questions for the trier of fact. *Burdine*, 450 U.S. at 258, 101 S. Ct. at 1096. The plaintiff also produced evidence of instances of discrimination involving other employees at the Western Way facility, both before and during her tenure there.[5] Viewing all the evidence in context, we believe that the plaintiff satisfied her burden of producing evidence sufficient to create a jury question on her § 1981 claim.

IV. Corporate Liability

As additional grounds for granting JNOV, the district court found that Southern [*1512] Bell could not be liable to Vance for damages even assuming that the alleged harassment constituted a violation of § 1981. The court held that because the evidence clearly showed that Vance failed to report the noose incidents to any "management personnel" despite the existence of adequate procedures for reporting grievances, Southern Bell could not be liable as a matter of law. We disagree.

Assuming that the plaintiff is able to show harassment sufficient to sustain a claim under Title VII or § 1981, there are

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[5]The discriminatory intent element can be proven "by direct or circumstantial evidence. The trier of fact should consider all the evidence. . . ." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3, 103 S. Ct. 1478, 1481 n. 3, 75 L. Ed. 2d 403 (1983). Thus, the jury properly could have considered evidence of discriminatory acts at the Western Way facility directed at employees other than the plaintiff, as tending to show the existence of racial animus in the present case.

two theories under which a corporate defendant can be held liable for hostile environment harassment at the workplace. First, where the hostile environment is created by one who is not the plaintiff's employer (i.e., a co-worker) the employer may be held liable through respondeat superior if the plaintiff can establish that the employer knew or should have known of the harassment and failed to take remedial action. *Henson*, 682 F.2d at 910.[6] The plaintiff can prove that the employer knew of the harassment by showing either that she complained to higher management or that the harassment was pervasive enough to charge the employer with constructive knowledge.

Second, where the harasser is himself the plaintiff's employer, or an agent of the employer, the employer is directly, rather than indirectly liable for the harassment. *Sparks*, 830 F.2d at 1558. Under this scenario "respondeat superior theory does not apply and plaintiff need not establish that she gave anyone notice of the harassment." *Id.*; *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985). Thus, a jury could properly hold the company liable for damages under § 1981 by finding that the illegal acts were committed by someone deemed to be the plaintiff's employer. In such a case, "whether his superiors know or should have known what he did is irrelevant. . . ." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (emphasis in original).

In order for this court to uphold the district court's ruling that the plaintiff failed to prove Southern Bell's liability for the acts committed by Wagner and others, the evidence must show that no reasonable jury could have found Southern Bell liable under either of the two theories outlined above. We must

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[6]In *Henson*, we assumed that the supervisor alleged to have created the hostile environment was not the plaintiff's employer. *Id.* at 905 n. 9.

therefore determine whether the evidence in this case is sufficient to create a jury question under either the theory of respondeat superior, or direct liability through an agent of Southern Bell.

A. Respondeat Superior

In its order granting JNOV, the district court ruled that even if the plaintiff had proved a violation of § 1981, Southern Bell could not be held liable for damages for hostile environment harassment. The court gave two reasons. First, assuming that the jury could have accepted the plaintiff's inference that Wagner hung the noose over her work station, she "failed to introduce any evidence that the Company knew of this," and thus it could not be liable under *Henson*. *Vance*, 672 F. Supp. at 1413. However, as previously noted, this court has held that an employer may be liable for the discriminatory acts of a non-management employee if "the harassment was so pervasive that an inference of constructive knowledge arises." *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Henson*, 682 F.2d at 910.

We believe that given all the evidence, a reasonable jury could have found that higher management should have known that the plaintiff was subjected to racial harassment. The jury must be permitted to consider all the evidence before it when making the factual determination of whether higher management should have been aware of the alleged harassment. By examining only the noose incidents, and finding that it was unreasonable for the [*1513] jury to charge the company with constructive knowledge of them, the district court failed to consider that the jury may properly have based a finding regarding the company's constructive knowledge on evidence other than that concerning the nooses. Just as the determination of whether conduct is sufficiently "severe and pervasive" to constitute actionable harassment requires evaluation of the totality of the circumstances, the factfinder here must examine the evidence in the same manner. Again the egregiousness, as

well as the number of the incidents, is plainly relevant.

Second, the district court held that the failure of the plaintiff to give the company timely notice and the provision by Southern Bell of adequate grievance procedures insulated the company from liability.[7] However, we conclude that in this case, the question was more properly one for the trier of fact. In Meritor, a sexual harassment case, the Supreme Court addressed the defendant's argument that its grievance procedures, along with the plaintiff's failure to provide the company with notice, protected the defendant from liability. The Court held first, that "absence of notice to an employer does not necessarily insulate that employer from liability." *Meritor*, 477 U.S. at 72, 106 S. Ct. at 2408. Next, the Court ruled that the availability of avenues for redress of an employee's grievances does not necessarily leave the employer free of liability:

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[7]The district court stated:

> Plaintiff testified that she did not immediately report the incident to any other supervisor even though other supervisors were available, and additionally, other supervisors were black. Defendant's procedures for reporting a grievance were adequate to encourage alleged victims of harassment to come forward, even if the alleged harassment was perpetrated by a direct supervisor. Plaintiff's failure to report the incident to any management personnel insulated the Company from liability in this case. See Meritor, 106 S. Ct. at 2409. Plaintiff's silence prevented the Company from taking reasonable steps to prevent future harassment. . . .

Vance, 672 F. Supp. at 1413.

> We reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general non-discrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

Id. at 72-73, 106 S. Ct. at 2408-09.

In several respects, the facts concerning notice and grievance procedures in this case are similar to those in Meritor. Vance testified that she did not report the noose incident because she was scared. Referring to the first noose incident, Vance testified:

> I didn't know who had [hung the noose]. I didn't know anyone in that warehouse. I may have been talking to the person actually that did this thing. So that is why I didn't say anything. (R.7-283).

When asked to explain why she did not bring the noose

to the attention of Wagner or Sellars after the second time it was hung at her workbench, the plaintiff testified:

> I felt that something was terribly wrong at Western Way. I didn't know Mr. Sellars, I didn't know Mr. Wagner. But for something like this to be allowed, someone had to know something, but I was too afraid to ask. (R.7-286).

We believe that a jury reasonably could have found that the plaintiff's testimony was credible, and that Southern Bell's grievance procedures did not rise to the [*1514] level necessary to insulate the company from liability under *Meritor*.[8] Thus we find that the district court erred in ruling that Southern Bell's grievance procedures insulated the company from liability as a matter of law.

B. Direct Liability

In *Meritor*, the Supreme Court addressed the issue of when a corporate defendant will be liable under Title VII for the acts of specific employees. The Court declined to issue a definitive

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[8]In *Henson*, we rejected the argument that an employer may escape liability for harassment by taking subsequent remedial action. "Such action by the employer may, of course, mitigate damages, but it in no way affects an employer's liability." *Henson*, 682 F.2d at 910 n. 19. In any event, the plaintiff produced substantial evidence that Southern Bell failed to investigate the noose incidents even after they were brought to its attention. Therefore, to the extent that the district court based its order granting JNOV on its conclusion that the "plaintiff's silence prevented the Company from taking reasonable steps to prevent future harassment or to remedy past harassment," *Vance*, 672 F. Supp. at 1413, the court erred.

rule, but held that courts should look to common law agency principles for guidance in this area. *Id.* at 72, 106 S. Ct. at 2408. We have held that where a plaintiff's alleged harasser acts as an agent of the employer, the harasser is the employer for purposes of Title VII. *Huddleston*, 845 F.2d at 904; *Sparks*, 830 F.2d at 1557-59.[9] "This liability is direct; the employer cannot find shelter in the claim that it neither had notice of, or approved of, the unlawful conduct." *Sparks*, 830 F.2d at 1559; 29 C.F.R. § 1606.8(c) (1988).

In *Sparks* we reversed a grant of summary judgment for the defendant in a sexual harassment action brought against the plaintiff's employer under Title VII. The district court had ruled that under *Henson* the plaintiff could not prevail because she had failed to allege that higher management knew or should have known that she was being harassed by her manager. We ruled that the district court had misconstrued *Henson*:

> In applying the respondeat superior requirement of *Henson*, . . . the district court overlooked the fact that the *Henson* court's decision to employ respondeat superior theory rested on its assumption that the plaintiff's alleged harasser was her supervisor but not her "employer." *Henson*, 682

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[9]42 U.S.C. § 2000e(b) (1982) provides in pertinent part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . . (emphasis added). We find that agency principles are similarly applicable where, as here, the harassment claim is brought under § 1981.

> F.2d at 905, n. 9. Here, in contrast, Sparks alleges that Long was both her supervisor and her "employer," as that term is defined under Title VII.

830 F.2d at 1557 (emphasis in original).

Similarly, the plaintiff in this case alleges that Wagner was an agent of the company for direct employer liability purposes. We must therefore ascertain whether the plaintiff produced substantial evidence at trial upon which the jury reasonably could have predicated a finding of direct liability through an agent of the company.[10] Specifically, we must determine whether the individual parties alleged to have committed acts of harassment against the plaintiff could be considered agents of Southern Bell.

Several courts, including ours, have held that in so called "tangible job detriment" harassment cases, a supervisory employee acts as an agent of his employer under [*1515] Title VII when that employee uses the authority delegated to him by the employer to harass the plaintiff. In *Sparks*, a tangible job

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[10]The district court correctly instructed the jury that the plaintiff could show the defendant's knowledge of the alleged harassment in one of two ways: either that "someone in a position of authority knew or should have known" of the harassment, or "that a supervisor acting within his or her scope of employment with the defendant, as an agent of the defendant, intentionally harassed the plaintiff because of her race. . . ." (R.10-161).

However, in its order granting the defendant's motion for JNOV, the court apparently ignored the possibility that the jury based its verdict on an agency theory, and held that Vance's failure to provide notice to higher management insulated Southern Bell from liability. This constitutes reversible error.

detriment case, we adopted the liability standard proposed by the EEOC in its amicus brief in *Meritor*[11] which would hold an employer directly liable for the actions of a supervisor "where [the] supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates." *Sparks*, 830 F.2d at 1559 (quoting *Meritor*, 477 U.S. at 70, 106 S. Ct. at 2407).[12] However, in that case, we found that the standard for determining an agency relationship in tangible job detriment cases was not necessarily applicable in other types of harassment cases:

> We need not address the issue raised by the EEOC, and not resolved by the Supreme Court, in Vinson: what rule should govern the employer's liability for sexual harassment by its supervisors where the sexual harassment claim rests "exclusively" on a "hostile environment" theory, in that the supervisor neither explicitly nor implicitly threatened to use his authority against the victim.

Id. at 1560 n. 9 (citation omitted).

We believe that an agency standard which looks solely to the degree of authority the harasser wields over the plaintiff is not particularly useful in a hostile environment case such as this one. As we stated in *Henson*, "the capacity of any person to create a

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[11]In *Meritor*, the Court stated the position proposed by the EEOC, but declined to rule on it. 477 U.S. at 72, 106 S. Ct. at 2408.

[12]See also *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (company held liable "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.")

hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." *Henson*, 682 F.2d at 910. While the supervisor's direct authority over the plaintiff must be considered as a relevant factor, we believe that courts should also examine any evidence bearing on the overall structure of the workplace, including the relative positions of the parties involved. We agree with the EEOC Guidelines, which state that it is necessary to examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity. 29 C.F.R. § 1606.8(c) (1988).

In *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986), the court found two supervisors to be agents of the fire department "despite their intermediate standing within the Department's hierarchy," based partly on their "authority over matters such as car assignments and the staffing of shifts. . . ." *Id.* at 442. Similarly, the plaintiff in the present case presented evidence that as her supervisor, Wagner had the authority to suspend employees, place discipline reports in employee personnel files, handle union grievance proceedings, and make personnel changes in his department.

Thus we believe that the plaintiff produced evidence from which a reasonable jury could conclude that in creating a hostile work environment, Wagner acted as an agent of Southern Bell under the standard outlined above. The district court therefore erred by ruling otherwise.

V. Motion for New Trial

The district court also ruled that were it not for the fact that the defendant's motion for JNOV is granted, the court would grant the defendant's motion for a new trial. The court found that the verdict was contrary to the great weight of the evidence,

and that the relief awarded was grossly excessive so as to shock the conscience of the court. *Vance*, 672 F. Supp. at 1415.

In a motion for a new trial, the court is free to weigh the evidence. *King v. Exxon Co., USA.*, 618 F.2d 1111, 1115 [*1516] (5th Cir.1980).[13] The court's decision on a motion for a new trial is given great deference and is reversible only for a clear abuse of discretion. *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir.1982). We believe that the grant of a new trial was within the discretion of the trial court, and we affirm the court's order.

The jury awarded the plaintiff $ 42,000.00 in back pay. However, the district court ruled that because Vance received her full salary for thirteen weeks, and half pay for seventeen weeks after she stopped work, she received only $4,262.75 less than she would have earned had she not stopped working. *Vance*, 672 F. Supp. at 1415. Thus we believe that the court's ruling that the award of back pay was grossly excessive was within its discretion.

The jury also awarded Vance $ 500,000.00 in front pay, for future lost wages. Front pay is available to a plaintiff who has been wrongfully discharged or forced to stop working, as a means of making her whole. See *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473-74 (11th Cir. 1985). The plaintiff's expert testified that reduced to present value, Vance's maximum lost pay over the course of her remaining working life (27 years) would be $ 390,404.00. Although the plaintiff argues that the loss of future fringe benefits could bring this figure to $500,000.00, we believe that the trial judge's ruling that this amount is grossly excessive must be affirmed.

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[13]For a discussion of the subtle differences between a motion for a JNOV and a new trial see *Bazile v. Bisso Marine Co.*, 606 F.2d 101 (5th Cir. 1979).

The plaintiff was awarded $ 500,000.00 for mental distress, emotional harm or humiliation caused by racial discrimination. Although the plaintiff produced evidence that she did suffer from stress caused by the hostile environment at the workplace, the trial judge correctly noted that there were many other unpleasant factors in her life which almost certainly contributed to her mental distress. *Vance*, 672 F. Supp. at 1416. The court also noted that the plaintiff is presently fully capable of working and leading a normal life. Thus we believe that the trial judge's ruling that these damages were grossly excessive must also be affirmed.

Finally, we find that it was within the discretion of the trial judge to rule that the award of $ 2.5 million in punitive damages was excessive. Even if the jury were properly able to conclude that the defendant acted with reckless or callous indifference in gross disregard of the plaintiff, *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632 (1983), the award is indeed high and rather shocking in view of the totality of the evidence in the case. This award seems to fit a pattern outside the realm of reasonableness in accordance with the instructions given to the jury. We therefore find that the size of each of the damage awards when considered in light of the evidence presented supports the district court's grant of a new trial.

The district court's order is AFFIRMED in part, REVERSED in part, and REMANDED for a new trial.

APPENDIX II-B

Vance v. Southern Bell Telephone and Telegraph Co.,
672 F. Supp. 1408 (M.D. Fla. 1987)

Mary Ann Vance, Plaintiff,

v.

Southern Bell Telephone and Telegraph Company, Defendant

Vance v. Southern Bell Tel. & Tel. Co.

No. 86-227-Civ-J-16

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

672 F. Supp. 1408; 1987 U.S. Dist. LEXIS 10749; 44 Fair Empl. Prac. Cas. (BNA) 1079; 44 Empl. Prac. Dec. (CCH) P37,313

August 11, 1987, Decided and Filed; Affirmed in part Reversed in part and Remanded January 23, 1989

COUNSEL:

Scott Fortune for Plaintiff.

Guy O. Farmer, II of Smith & Hulsey for Defendant.

OPINION BY: MOORE

OPINION: [*1409] ORDER

John H. Moore II, United States District Judge

This cause is before the Court upon the Defendant's, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY (Southern Bell), motions for judgment notwithstanding the verdict and for a new trial or to alter or amend the judgment.

Plaintiff, a black woman, commenced this action on March 27, 1986, pursuant to [*1410] 42 U.S.C. §§ 1981, 1985(3) and 1986, alleging that Southern Bell and numerous other named individuals discriminated against her because of her race and sex. Prior to the jury trial on April 6, 1987, the Plaintiff announced that she would not seek to hold the individual defendants liable. At the end of her case Plaintiff moved to dismiss the counts alleging violations under 42 U.S.C. §§ 1985(3) and 1986. The jury trial proceeded against the Defendant, SOUTHERN BELL, solely on the basis of 42 U.S.C. § 1981. On April 13, 1987, the jury returned its verdict in favor of the Plaintiff and established Plaintiff's damages for past lost wages, future lost wages, mental distress, emotional harm or humiliation, past medical expenses and punitive damages. The Court entered judgment on April 14, 1987, and the Defendant timely filed its motion which is here under consideration.

Considering all of the evidence and reasonable inferences therefrom in the light most favorable to the Plaintiff, as this Court must do, the Court finds that Defendant's motion for judgment notwithstanding the verdict should be granted.

Findings of Fact

The Plaintiff commenced work for the Defendant approximately in March, 1972. Although the Plaintiff had some attendance problems, she generally had a good record and was considered an acceptable employee of Southern Bell. She had worked in various capacities and at various locations; however, until 1984 she had not worked at the facility where she contends the discrimination occurred. The Plaintiff bid for a job at the Defendant's Western Way facility as a material services coordinator. While such a move was a step up in salary, it was considered a step down in job classification.

Prior to her bid being accepted and her being transferred to the Western Way facility, the Plaintiff never experienced any

racial discrimination with Southern Bell, whose work force is made up of approximately 25 % minority members. On August 13, 1984, the Plaintiff commenced work at the Western Way facility in the CONECS department under the supervision of Paul Wagner, a first-level supervisor.

One week after she commenced work in the CONECS department, Plaintiff alleges that when she reported to work she found a "noose" hanging from the light fixture above her work bench. In her opinion, this was an act of racial discrimination. At the time of this alleged incident, there were several "imports" working at the Western Way facility. An "import" is an individual who is temporarily assigned at the facility, having come from another of Southern Bell's facilities. The Plaintiff testified that Mr. Oliver, a white co-worker, told one of the "imports" to take the "noose" down. However, contrary to her testimony, one of the witnesses she called, a Mr. Ball, testified that he took the "noose" down on the first occasion. Mr. Ball also was a co-worker. Two days later, approximately August 22, 1984, Plaintiff reported for work and again found the "noose" hanging from the light fixture. This time, she testified, she took the "noose" down and buried it in some trash. Neither she nor anyone else has seen the "noose" since then. She did not report either of these two incidents to anyone.

There is no evidence as to who allegedly hung the noose. At a grievance hearing conducted pursuant to the collective bargaining agreement on January 9, 1985, approximately 4-1/2 months after the alleged noose incidents, the Plaintiff first mentioned the noose to management. At that hearing, Mr. Albert Sellars, the manager of the Western Way warehouse, stated that "Paul probably did it to increase productivity." This statement undisputably referred to Mr. Paul Wagner. Mr. Wagner testified that he made a similar device for the purpose of de-sheathing cable; however, that device was ultimately replaced by a more sophisticated arrangement involving a winch. It is obvious that the remark regarding an increase in productivity

related to the fact that Mr. Wagner had made the device; not that he hung it over the Plaintiff's workbench.

[*1411] On September 9, 1984, the Plaintiff received her first transfer and was transferred from the CONECS to the Repair and Returns department under the supervision of Walter Stembridge, another first-level supervisor. During her tenure under Mr. Stembridge, Plaintiff contends that she did not receive adequate training. No evidence was presented to show that anyone else received any more or less training then she did. In fact, evidence was presented that on two occasions outside trainers were called in to train the entire section, including Plaintiff, that Mr. Stembridge personally trained her on at least one occasion, and that Plaintiff was trained by Mr. Williams who was one of the most experienced people in the group.

On September 18, 1984, while Plaintiff was still working in the Repairs and Returns department, Mr. Tommy Lee Sampson, a black manager of Employment and Selections from Southern Bell's main office, contacted the Plaintiff about an allegation that she falsely omitted information about a traffic violation on a transfer application. The Plaintiff was suspended by Mr. Sampson for two days without pay as a result of this omission. Ultimately, Mr. Sampson reduced the disciplinary record to a warning entry, but refused to authorize reimbursement for the two days pay. The Plaintiff alleges that several black employees were disciplined in a similar manner, but that a white employee, Mr. Clyde Oliver, was not treated similarly. Mr. Oliver received a written warning for failing to report a conviction for stealing gasoline when he was 16 years of age. In determining the discipline to be imposed in each instance, Mr. Sampson explained that he took into consideration various matters such as prior infractions, when the subject infraction occurred, and the age of the individuals involved. At the time he was disciplined, Mr. Oliver was in his late 30's and purportedly had an otherwise clean record. At the time the Plaintiff was disciplined, the violation that she falsely omitted from her application was about

three years old, and her record at Southern Bell contained other past disciplinary problems.

A grievance hearing concerning the discipline imposed was conducted on October 16, 1984. Both Mr. Sampson and Plaintiff testified at trial that Plaintiff became upset and cried during this meeting. At the conclusion of the hearing, she returned to work in the Repairs and Returns area, whereupon an "altercation" ensured between Plaintiff and Ms. Joyce Foskey Blackwood. Their supervisor, Mr. Stembridge, immediately suspended both women without pay. Mr. Blackwood grieved her suspension, and after investigating the altercation, the company rescinded the suspension and paid Ms. Blackwood her wages. Plaintiff also grieved her suspension, but the company did not grant her grievance.

Plaintiff alleges that this unequal treatment was racially motivated. The evidence, however, was that independent investigations were conducted by Defendant's security department, by the union, and by the supervisor. All three investigations resulted in a findings that Plaintiff struck Ms. Blackwood, and that Ms. Blackwood did not strike Plaintiff. Moreover, Plaintiff testified that she did, in fact, hit Ms. Blackwood.

On November 15, 1984, Plaintiff suffered an "anxiety attack" while at work. Plaintiff alleges that she, or another person, asked Mr. Stembridge to take her to Baptist Hospital, but that Mr. Stembridge instead took her to Memorial Hospital as an act of intentional racial discrimination. The evidence was inconclusive as to whether Mr. Stembridge heard Plaintiff ask to be taken to Baptist Hospital or whether he knew why Plaintiff wanted to go there. Plaintiff and her doctor, Dr. Alexander Rosin, testified that the doctor was to meet her at Baptist, and that Plaintiff had told him of the racial discrimination she had been suffering. About a week before the "anxiety attack," Dr. Rosin sent a letter "To Whom It May Concern" at Southern Bell,

stating that Plaintiff told him she was experiencing "undue pressure and harassment on her job," and that "her statements sounded quite legitimate" to him. Again, the evidence was inconclusive as to whether Mr. Stembridge ever received this letter, [*1412] or whether Mr. Stembridge knew Dr. Rosin would be at Baptist Hospital.

As a result of Plaintiff's "anxiety attack," she remained out on sick leave, with full pay, from November 15, 1984 until January 10, 1985. On January 9, 1985, Plaintiff and Defendant attended the grievance hearing concerning the discipline Plaintiff received after the altercation with Ms. Blackwood. The union initially requested that Plaintiff be disciplined in the same fashion as Ms. Blackwood. Defendant would not agree to this because the investigations indicated Plaintiff struck Ms. Blackwood. Defendant, however, tried to negotiate a settlement. One offer by Defendant was that Plaintiff's suspension would be reduced to 1/2 day if Plaintiff would drop her Jacksonville EEOC (JEOC) complaint against Defendant. Plaintiff refused the offer and her discipline remained as initially given.

Plaintiff claims that this attempt to settle her grievance is racial discrimination because the JEOC complaint was unrelated to the grievance hearing and the JEOC complaint contained a charge of racial discrimina-tion. The evidence given at trial, however, was that the attempted settlement was simply for negotiating Plaintiff's grievance. Ms. Nancy Murray, Defendant's staff manager of labor relations, testified that such negotiations are attempted frequently, regardless of what the JEOC complaint is about, and regardless of the person's race. Ms. Murray also testified that the union representative for Plaintiff accepted the proposal concerning Plaintiff, but that Plaintiff would not accept it.

Plaintiff also alleges that Defendant's refusal to transfer her to different sections within the warehouse was the result of racial discrimination. However, Plaintiff produced no evidence that

Defendant, in fact, refused to transfer Plaintiff. Plaintiff submitted letters from her doctor requesting a transfer, but she never submitted evidence that she complied with the procedures necessary for transfer under the working agreement with the union. Evidence was given that Defendant transferred other employees without the employees first complying with the technical procedures. Finally, Mr. Sellers testified that in March, 1985 a position was available in another section, and Defendant transferred Plaintiff before transferring senior people who had submitted transfer requests. This was Plaintiff's second transfer within approximately seven months.

There was testimony regarding other incidents, none of which involved the Plaintiff. In one, a black employee was rebuked by white employees to sit at a different table in the lunch room. She refused, and no further trouble ensured. Another involved the repetition of a racial slur which occurred at a different location approximately three hundred fifty miles away. A first-line supervisor at the Western Way facility was reprimanded for having repeated the story.

Additional Findings of Fact and Conclusions of Law

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of motions is proper. . .

> A mere scintilla of evidence is insufficient to present a question for the jury. . . There must be a conflict in substantial evidence to create a jury question.

Neff v. Kehoe, 708 F.2d 639, 641-42 (11th Cir. 1983) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)).

Claims of discrimination under § 1981 are analyzed within the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1451 (11th Cir. 1987). Under this framework, Plaintiff first must present a prima facie case of race discrimination. This is done by showing that Plaintiff [*1413] belongs to a racial minority and that the Defendant treated Plaintiff differently from non-minority employees similarly situated. Once presented, the burden of production shifts to the Defendant "to articulate some legitimate, nondiscriminatory reason" for its employment decisions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If the Defendant does proffer nondiscriminatory reasons for its actions, Plaintiff must prove, by a preponderance of the evidence, that Defendant's proffered reasons are not the real reasons, but are a pretext for discrimination. This burden merges with the ultimate burden of persuading the jury that Plaintiff was "the victim of intentional discrimination." *Smith v. Papp Clinic*, 808 F.2d at 1451.

Plaintiff alleged that the discrimination she suffered was in the form of harassment. Therefore, she additionally had to prove that the actions directed toward her were not isolated, trivial, or incidental, but were so numerous as to constitute persistent, widespread customs or practices. Plaintiff had to show that the alleged harassment denied her the same right to make and enforce her contract of employment as was enjoyed by white citizens. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 2405-06, 91 L. Ed. 2d 49 (1986). Plaintiff also had to prove that the Defendant company knew or should have known

of this harassment. *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986). Plaintiff could have proved this by showing that she complained to higher management of the harassment, or that the harassment was pervasive, thus putting higher management on constructive notice. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

This Court finds that Plaintiff failed to offer proof that the Defendant intentionally discriminated against her because of her race. The evidence, viewed in the light most favorable to Plaintiff, concerning the noose incidents was that a noose was hung over Plaintiff's desk on two different occasions. Two incidents are not enough to establish that the alleged harassment was a persistent, pervasive practice. *Henson*, 682 F.2d at 904; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986).

The evidence also showed that Plaintiff's supervisor, Paul Wagner, created a device to de-sheath cable and that that device resembled a noose. Accepting Plaintiff's inference that Mr. Wagner hung the noose over Plaintiff's desk, Plaintiff failed to introduce any evidence that the Company knew of this. Plaintiff testified that she did not immediately report the incident to any other supervisor even though other supervisors were available, and additionally, other supervisors were black. defendant's procedures for reporting a grievance were adequate to encourage alleged victims of harassment to come forward, even if the alleged harassment was perpetrated by a direct supervisor. Plaintiff's failure to report the incident to any management personnel insulated the Company from liability in this case. See *Meritor*, 106 S. Ct. at 2409. Plaintiff's silence prevented the Company from taking reasonable steps to prevent future harassment or to remedy past harassment.

Plaintiff failed to establish a prima facie case of racial discrimination with respect to her claim that she received inadequate training. Plaintiff did not introduce evidence that Defendant treated her differently from non-minority employees

similarly situated.

Plaintiff established a prima facie case of racial discrimination with respect to the discipline she received as a result of the false entry on an application; i.e., the omission of a traffic violation. However, Defendant successfully offered legitimate, non-discriminatory reasons for the discipline. Plaintiff failed to introduce any evidence to prove that these reasons were a pretext for intentional discrimination. Furthermore, Plaintiff failed to explain how the black manager, Mr. Sampson, could racially discriminate against a black employee.

Plaintiff also established a prima facie case of racial discrimination with respect [*1414] to the discipline she received as a result of the altercation she had with Ms. Blackwood. Ms. Blackwood, a white woman, successfully grieved her suspension, but Plaintiff did not successfully grieve hers. Defendant articulated a legitimate, nondiscriminatory reason for the differences in the two women's cases. Defendant offered evidence that investigations resulted in a finding that Plaintiff struck Ms. Blackwood.

Plaintiff attempted to rebut Defendant's proffer of the nondiscriminatory reasons for the harsher discipline by presenting evidence that an altercation between a white man and a white woman resulted in a lesser discipline for them than that Plaintiff received. These people were involved in a "tug-of-war" over a cart. As a result of this altercation, both received warning entries in their records. The testimony concerning the tug-of-war altercation revealed that no one struck any blows, and that most of the employees who witnessed it thought the two people were playing. Moreover, the two people worked different shifts, so they did not have to be suspended immediately in order to "cool off," as was the case with Plaintiff and Ms. Blackwood. Thus, the evidence showed that the two altercations were not similar. Moreover, this evidence did not prove that the reason for

Plaintiff's discipline was just a pretext for racial discrimination.

The evidence Plaintiff introduced concerning her "anxiety attack" did not establish by a preponderance of the evidence that the Defendant racially discriminated against Plaintiff. This claim of discrimination stems from the fact that her supervisor, Mr. Stembridge, took her to Memorial, and not Baptist, Hospital. As stated earlier, the evidence was inconclusive as to whether Mr. Stembridge heard Plaintiff ask to be taken to Baptist Hospital. Assuming that he did hear her request, Defendant nonetheless offered testimony to legitimately explain the actions of Mr. Stembridge. Mr. Stembridge testified that he took Plaintiff to Memorial Hospital because he believed it was the closer hospital and also because it was the hospital normally used by Defendant for employees.

Plaintiff attempted to rebut this testimony by claiming Mr. Stembridge did not want to take her to see her doctor at Baptist because to do so would verify, for the doctor, her claim of racial discrimination. Plaintiff cites the letter Dr. Rosin sent to Southern Bell as evidence that Mr. Stembridge knew Dr. Rosin was aware of racial discrimination at the warehouse, and thus that Mr. Stembridge desired to avoid the doctor. The inference Plaintiff tried to establish simply is not reasonable. No evidence was introduced to show that Plaintiff ever complained to anyone at Southern Bell of racial discrimination prior to this incident. No evidence was introduced to show that Mr. Stembridge ever saw or read Dr. Rosin's letter. More important, however, is that Dr. Rosin's letter does not mention racial discrimination. The letter stated only that Plaintiff told him about "undue pressure and harassment." this "mere scintilla" of evidence is insufficient to create a conflict in substantial evidence. *Neff v. Kehoe*, 708 F.2d at 642.

Plaintiff also failed to create a conflict in substantial evidence on her claim that Defendant racially discriminated against her in its attempt to settle her grievance of her

"Blackwood altercation" discipline. This claim revolves around Defendant's offer to reduce Plaintiff's suspension to 1/2 day if she would drop an unrelated JEOC complaint against Defendant. Defendant offered evidence that negotiations such as this take place frequently, regardless of the party's race or the content of the JEOC complaint. Plaintiff offered no evidence in rebuttal, and therefore, did not sustain her burden of proving intentional discrimination.

Finally, Plaintiff failed to establish a prima facie case on her claim that Defendant's refusal to transfer her was the result of racial discrimination. The evidence indisputably showed that Plaintiff did not comply with the technical procedures necessary to effect the transfers she desired. Evidence also was given that Defendant transferred other employees without [*1415] the employees first complying with the technical procedures. The transferred employees were, like Plaintiff, black but were, unlike Plaintiff, in supervisory positions. A finding of intentional racial discrimination under § 1981 cannot be based on evidence that Defendant failed to treat Plaintiff, a black hourly employee, the same as it treated black supervisory employees.

In considering all of the evidence in the light and with all reasonable inferences most favorable to the Plaintiff, the Court concludes that the facts and inferences are strongly and overwhelmingly in favor of the Defendant. Therefore, the Court believes that reasonable men could not arrive at a verdict for Plaintiff. In addition to the above evidence, other evidence presented at trial indicates that Defendant made every possible concession to Plaintiff. Plaintiff began working at the Western Way facility in August, 1984. After three months, she took a disability leave, with full pay, for two months, until January, 1985. She returned to the warehouse for a month and then took another month off with full pay. In March, 1985, she went back to work at the facility and continued for seven months, or until October, 1985. On October 14, 1985, Plaintiff left the warehouse and, to date, has never returned. She received full pay for three

months after leaving, and then received half pay for an additional nine months. From August, 1984 to October, 1986, Plaintiff was physically in the warehouse working for Defendant for a total of eleven (11) months. During that time Plaintiff received, from Defendant, her full salary for seventeen (17) months and half salary for nine (9) months. The Court finds that no conflict in substantial evidence exists and Defendant's motion for judgment notwithstanding the verdict should be granted.

In the alternative, were the Court not to grant Defendant's motion for judgment notwithstanding the verdict, Defendant's motion for a new trial should be granted. The relief awarded by the jury to the Plaintiff is contrary to the great weight of the evidence. Moreover, the relief awarded is grossly excessive and is thus indicative of bias, passion, and prejudice so as to shock the conscience of the court. *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305 (11th Cir. 1984), cert. denied, 472 U.S. 1008, 86 L. Ed. 2d 720, 105 S. Ct. 2704
(1985).

The jury awarded Plaintiff $ 42,000.00 for past lost wages and fringe benefits (back pay). This amount is contrary to the great weight of the evidence. The evidence presented at trial was that Plaintiff's salary was, and would have been, $ 501.50 a week. Had Plaintiff reported to work from October 15, 1985 (the day she left the Western Way warehouse) to May 1, 1986 (the day Plaintiff and all employees at the Western Way warehouse became employees of BellSouth Services) she would have received her full salary of $ 15,045.00. The evidence is undisputed that Plaintiff received her full salary for thirteen (13) weeks for a total of $ 6,519.50 and half-pay for the remaining seventeen (17) weeks, for a total of $ 4,262.75. Therefore, Plaintiff received $ 10,782.25 in salary, or just $ 4,262.75 less than she would have earned had she continued to work at the warehouse. Furthermore, Plaintiff received all of her fringe benefits through October, 1986. The award of $ 42,000.00 is

clearly excessive.

Plaintiff also was awarded $ 500,000.00 for lost wages that she is reasonably certain to incur in the future, or front pay. Front pay is awarded to an individual who was terminated, discharged or constructively discharged and is seeking reinstatement as part of the requested relief. *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543 (11th Cir. 1984). Front pay is appropriate to make a plaintiff whole where the plaintiff seeks reinstatement. This from of relief is used as short-term alternative. *Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). In this case, Plaintiff was not discharged, was not constructively discharged, and was not seeking reinstatement. Therefore, front pay is not appropriate.

Even assuming that front pay is an appropriate remedy in this case, the [*1416] amount awarded to Plaintiff is excessive. Because it is a short-term alternative, front pay is computed on the basis of a few months or years in order to compensate the plaintiff for wages lost between discharge and reinstatement. *See, e.g., Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3rd Cir. 1984) (four-months front pay, longer period too speculative); *McDowell v. Mississippi Power and Light*, 641 F. Supp. 424 (S.D. Miss. 1986) (front pay for six to twelve months until plaintiff reaches correct level); *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403 (S.D.N.Y. 1982) (front pay for one year in lieu of reinstatement). In the case sub judice, the front pay award was computed for Plaintiff's remaining working life, or for twenty-seven (27) years. This award is unreasonable.

Finally, Plaintiff's expert testified that an award of $ 330,000.00 would make her whole. The jury awarded Plaintiff $ 500,000.00. Thus, the award is shown to be excessive even by Plaintiff's standards.

The jury awarded Plaintiff $ 500,000.00 to compensate her for the mental distress, emotional harm, or humiliation she

suffered because of the alleged racial discrimination. This award is contrary to the great weight of the evidence. Plaintiff had the burden of proving that the alleged discrimination by the Defendant caused the stress that resulted in her alleged emotional harm or humiliation. *Carey v. Piphus*, 435 U.S. 247, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978). Plaintiff produced evidence that she did suffer from stress; however, the evidence she produced also showed that the majority of the stress she suffered was not created by Defendant. For example, Plaintiff was having trouble with her spouse because he had been named in a paternity suit by another woman. Moreover, Plaintiff had been in an automobile accident, had been having financial problems, had dietary problems, and had suffered with the illnesses and deaths of members of her family. In view of all of the evidence surrounding Plaintiff's non-job related stress, she did not prove with sufficient certainty that the alleged discrimination by Defendant caused her emotional harm. *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985).

Even if compensatory damages were appropriate in this case, the award of $ 500,000.00 is excessive. Plaintiff did not claim, nor did she prove, that any of the alleged emotional harm she suffered resulted in any permanent disability. The evidence showed, in fact, that Plaintiff is fully capable of working and functioning normally. Therefore, the Court concludes that the jury award is the result of bias, passion, or prejudice, and cannot stand. *Rodgers v. Fisher Body Division of General Motors Corp.*, 739 F.2d 1102 (6th Cir. 1984), cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1759 (1985).

The award of $ 2,500,000.00 as punitive damages is contrary to the great weight of the evidence and is so grossly excessive as to shock the conscience of the Court. A finding of liability for intentional racial discrimination in a § 1981 action does not automatically entitle the Plaintiff to an award of punitive damages. *Johnson v. Railway Express Agency*, 421 U.S. 454, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). Punitive damages are to be

awarded only when the jury finds that the Defendant's conduct was prompted by evil motives or involved reckless or callous indifference in gross disregard of the rights of Plaintiff. The award must be supported by the evidence and cannot be merely a windfall to the Plaintiff. *Smith v. Wade*, 461 U.S. 30, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983).

In this case, Plaintiff failed to present any evidence that Defendant had an evil motive or showed reckless or callous indifference in gross disregard of her rights. Plaintiff also failed to show that punitive damages should be imposed to deter Defendant from future discriminatory conduct. The evidence presented to the jury was that almost twenty-five per cent of the Defendant's employees are black. Moreover, the evidence showed that the Defendant imposed discipline against supervisors who used racial slurs in the warehouse, and that the Defendant immediately investigated any alleged discrimination. Therefore, the Court concludes that the award of punitive [*1417] damages is contrary to the great weight of the evidence.

The Court also concludes that the award of punitive damages is excessive. This conclusion is made after comparing this award with other punitive damage awards in which the defendant was found to have violated § 1981. *See, e.g., Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st cir. 1987) ($ 50,000.00 for each of three plaintiffs); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) ($ 25,000.00); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) ($ 1,000.00); *Ramsey v. American Filter Co.*, 772 F.2d 1303 (7th Cir. 1985) ($ 150,000.00 reduced to $ 20,000.00); *Rodgers v. Fisher Body Division of General Motors*, 739 F.2d 1102 (6th Cir. 1984), cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1759 (1985) (reversed and remanded for new trial because punitive damages of $ 500,000.00 excessive); *Reeder-Baker v. Lincoln Nat. Corp.*, 649 F. Supp. 647 (N.D. Ind. 1986) ($ 25,000.00). Thus, a new trial is warranted.

In conclusion, this Court finds that each award of damages in this case is contrary to the great weight of the evidence, and is also grossly excessive. These awards cannot be anything but the result of bias, passion or prejudice on the part of the jury. Were it not for the fact that Defendant's motion for judgment notwithstanding the verdict is being granted, this Court would grant Defendant's motion for a new trial.

Accordingly, the Court now

ORDERS and ADJUDGES:

1. That Defendant's motion for judgment notwithstanding the verdict be and the same is hereby GRANTED.

2. That the judgment entered herein on April 14, 1987 be and the same is hereby VACATED.

3. That the Clerk of the Court is hereby ORDERED to enter judgment for Defendant, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

4. That Plaintiff's motion for sanctions against Defendant, filed herein on June 1, 1987, be and the same is hereby DENIED.

5. That Plaintiff's motion to tax costs, filed herein on June 4, 1987, be an the same is hereby DENIED.

6. That Plaintiff's motion for attorney's fees, filed herein on June 8, 1987, be and the same is hereby DENIED.

DONE and ORDERED in Chambers at Jacksonville, Florida this 11 day of August, 1987.

APPENDIX III-A

Order denying rehearing en banc

ENTERED JUL 2 1 1994

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3559

MARY ANN VANCE,

Plaintiff-Appellee,
Cross-Appellant,

versus,

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, a Georgia corporation,

Defendant-Appellant,
Cross-Appellee,

JOYCE FOSKEY, ETAL.,

Defendants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 5, 1993, 11th Cir., 19____, __F.2d__).

Before: TJOFLAT, Chief Judge, FAY and EDMONDSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

No. 94-1168

In The

Supreme Court of the United States

October Term, 1994

MARY ANN VANCE,

Petitioner,

vs.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT OF PARENT CORPORATIONS AND SUBSIDIARIES

The following information is provided pursuant to Rule 29.1 of the Rules of this Court:

Southern Bell Telephone & Telegraph Company is a trade name of BellSouth Telecommunications, Inc.

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BellSouth Corporation

Subsidiaries of BellSouth Telecommunications, Inc.

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Bellcore Ventures, Inc.
BellSouth Advanced Networks, Inc.
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RULE 29.1 STATEMENT OF PARENT CORPORATIONS AND SUBSIDIARIES – Continued

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RULE 29.1 STATEMENT OF PARENT CORPORATIONS AND SUBSIDIARIES – Continued

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Sunlink Corporation
TechSouth, Inc.
Telcel Cellular, C.A.
UK Holdings, Inc.
Uniquest Incorporated
Vencorp.

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STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1866 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

R.S. § 1977, 14 Stat. 27 (formerly codified as 42 U.S.C.A. § 1981 (West 1981)).

The Civil Rights Act of 1991 amended § 1981 as follows:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. 102-166, § 101, 105 Stat. 1071 (codified as 42 U.S.C. § 1981(b) (1994)).

REASONS FOR DENYING THE WRIT

Respondent, Southern Bell Telephone & Telegraph Company,[1] respectfully submits that the Petition for Writ of Certiorari (hereinafter referred to as the Petition), which seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Vance v. Southern Bell Telephone & Telegraph Co.*, 983 F.2d 1573 (11th Cir. 1993), should be denied.

I. THIS CASE DOES NOT PRESENT THE "SPECIAL AND IMPORTANT REASONS" REQUIRED TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT.

Petitioner fails to demonstrate any compelling reason for this Court's exercise of its discretionary jurisdiction. According to the Rules of the Supreme Court,

> review on writ of certiorari is not a matter of right, but of judicial discretion. . . . [and] will be granted only when there are special and important reasons therefor.

Sup. Ct. R. 10.1. Examples of such "special and important reasons" include "conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law," *Braxton v. United States*, 500 U.S. 344, 347 (1991), and decisions of state or federal courts on "important question[s] of federal law" that have not yet

---

[1] Respondent, Southern Bell Telephone & Telegraph Company ("Southern Bell") appeared as Defendant/Appellant below. Petitioner, Mary Ann Vance, appeared as Plaintiff/Appellee below.

been settled or decisions on federal questions that conflict with the established law of this Court. Sup. Ct. R. 10.1(c).

No such "special and important reasons" exist in this case. Neither the retroactive application of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), nor the directed verdict entered against Petitioner on her state law tort claim deprives Petitioner of her constitutional rights under the Fifth and Seventh Amendments. Indeed, the Eleventh Circuit's decision in *Vance* is consistent with decisions rendered by the state courts of Florida, the federal circuit courts of appeal, and the United States Supreme Court itself. Without "special and important reasons therefor," the Petition for Writ of Certiorari sought in this case must be denied. Sup. Ct. R. 10.1.

II. THE ELEVENTH CIRCUIT CORRECTLY CONSTRUED § 1981 – AS ORIGINALLY ENACTED AND AS INTERPRETED IN *PATTERSON* – TO BAR PETITIONER'S RACIAL HARASSMENT CLAIMS.

Petitioner argues that the Eleventh Circuit mistakenly relied upon *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), to bar her racial harassment claims under § 1981. She contends that the Eleventh Circuit has erroneously applied a decision that was not the law "at the time the wrongs occurred in 1984, at the time of Southern Bell's first conviction in 1987[,] . . . at the time of the first appellate mandate in 1989. . . . [or] at the time of the second appellate mandate in February of 1993." Petition at 5. Petitioner concludes, then, by asserting that the Eleventh Circuit's retroactive application in *Patterson* –

despite the "pre-*Patterson* prohibition of racial harassment" and the subsequent "statutory nullification of the [*Patterson*] decision" by the Civil Rights Act of 1991 – results in a "manifest injustice" to Petitioner. Petition at 5-8.

Petitioner's argument is seriously flawed. Not only does she misinterpret law relating to claims based upon allegations of racial harassment (specifically, 42 U.S.C. § 1981) in existence before 1991, she also misconstrues the effect of Congress' enactment of the Civil Rights Act of 1991 upon the *Patterson* decision. This Court, in *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), has very recently considered – and rejected – each of the arguments advanced by the Petitioner. The *Roadway Express* opinion confirms that the Eleventh Circuit did not make the wrong "choice of law," as Petitioner contends, but instead properly relied upon § 1981 – as originally enacted and interpreted in *Patterson* – to bar Petitioner's racial discrimination claims.

A. Petitioner misinterprets the "pre-*Patterson* prohibition of racial harassment" under § 1981.

Petitioner first assumes that, "at the time the wrongs occurred in 1984," § 1981 prohibited post-contract formation racial harassment and discrimination of the kind that she allegedly suffered. Petition at 5. Yet even before the Supreme Court decided *Patterson*, § 1981 did not prohibit discriminatory conduct occurring after contract formation, such as the post-hiring racial harassment, discriminatory denial of transfer, and constructive discharge asserted by Vance. Rather, § 1981 simply provided remedies for racial discrimination in the "mak[ing] and

enforce[ment] of contracts." 42 U.S.C.A. § 1981 (West 1981). Petitioner's construction of the "pre-*Patterson*" version of § 1981, then, contradicts the plain language of the statute itself.

B. *Patterson* did not enact a new rule of statutory interpretation, but simply corrected earlier interpretations of § 1981.

Petitioner not only ignores the plain language of § 1981, she asserts that she somehow relied upon the "pre-*Patterson* prohibition of racial harassment," as if to suggest that the *Patterson* opinion itself changed the scope of § 1981. *See* Petition at 5. Contrary to Petitioner's suggestions, *Patterson* simply clarified the statute's *existing* limitations.

In interpreting § 1981, the *Patterson* Court noted that the statute's "most obvious feature" was "the restriction of its scope to . . . discrimination in the 'mak[ing] and enforce[ment]' of contracts alone." 491 U.S. 164, 176. Accordingly, the Court emphasized that

> racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

Id. at 171.

Although the *Patterson* decision may have contradicted the interpretation given to § 1981 by certain federal courts, the rule announced by the Court was not a

new one. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. at 1519. As this Court explained in *Roadway Express:*

> *Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect.*

Id. Petitioner cannot assert, then, that the Eleventh Circuit erred when it chose not to rely upon the "pre-*Patterson* prohibition of racial harassment." Section 1981 – even before *Patterson* – did not encompass the discriminatory conduct allegedly committed by Southern Bell. *See Roadway Express,* 114 S. Ct. at 1513, 1519; *Patterson,* 491 U.S. at 176.

C. Even assuming that *Patterson* did announce a new interpretation of § 1981, the Eleventh Circuit did not err in finding that *Beam* required retroactive application of *Patterson* to the facts of this case.

The Eleventh Circuit did not have the benefit of the *Roadway Express* opinion in deciding *Vance,* but properly concluded that *Patterson* simply declared what § 1981 had always meant. *See Vance,* 983 F.2d at 1576-77. Notwithstanding its conclusion, the Eleventh Circuit went a step further, assuming – for the sake of argument – that *Patterson* had announced a new rule. *See id.* Even under this analysis, the *Vance* court determined that another recent decision of the Court, *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), "command[ed] retroactive application of *Patterson*" to bar the Petitioner's § 1981 claims. 983 F.2d at 1576.

In *Beam* the Court found that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." 501 U.S. at 540. The question before the court in *Vance*, then, was "whether the *Patterson* court applied its interpretation of section 1981's 'make and enforce' language to the parties in the *Patterson* case." 983 F.2d at 1576. Because the *Patterson* Court had applied its interpretation of § 1981 to the litigants in that case, the Eleventh Circuit reasoned that the *Patterson* interpretation of § 1981 governed all pending cases, including *Vance*. *See Vance*, 983 F.2d at 1576-77.

Petitioner attacks the Eleventh Circuit's reliance on *Beam*, characterizing the decision as yet "another intervening decision of the Supreme Court . . . which did not exist during any of the trial court proceedings." Petition at 5. In criticizing the *Vance* court's interpretation of *Beam* – and in suggesting that *Patterson* should not have been retroactively applied – Petitioner ignores the very principles of equality and stare decisis emphasized by this Court in *Beam*, 501 U.S. at 543,[2] as well as the recent ruling of this Court in *Roadway Express*. Moreover, the fact that the *Beam* decision "did not exist during any of the trial court proceedings" is simply not relevant: "an appellate court must apply the law in effect at the time it

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[2] As the *Beam* Court stated:

> Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship. . . .

501 U.S. at 543.

renders its decision,"[3] not the law in effect when the case is tried. Petitioner fails to demonstrate any error in the Eleventh Circuit's reasoning.

D. *Patterson* remains valid law even after the enactment of the Civil Rights Act of 1991.

Petitioner next argues that Congress' enactment of the Civil Rights Act of 1991 effectively "nullified" the *Patterson* decision, and concludes that "*Patterson* was . . . not the law at the time of the second appellate mandate in February of 1993." Petition at 5. Petitioner once again cannot demonstrate that the Eleventh Circuit has erred in its interpretation and application of the governing law.

In 1991 Congress amended § 1981 to prohibit discrimination not only in the "making and enforcement" of contracts, but also in

> the . . . performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (codified as 42 U.S.C. § 1981(b)). Although the 1991 amendments did expand the scope of prohibited conduct, this legislative response to *Patterson*

> does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter.

Roadway Express, 114 S. Ct. at 1515.

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[3] *Bradley v. School Board of Richmond*, 416 U.S. 696, 714 (1974) (quoting *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 281 (1969)).

No matter what Congress' view of the Supreme Court's decision in *Patterson*, the Civil Rights Act of 1991 does not clearly evidence any legislative intent to reach cases arising *before* its enactment. *See id.* at 1515-16. Because the 1991 amendment applies only to claims arising after November 21, 1991, the effective date of the statute,[4] Congress' enactment of the Civil Rights Act of 1991 did not in any way "nullify" the effect of *Patterson*. *Patterson* continues to

> provide[] the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991.

114 S. Ct. at 1519.

The Eleventh Circuit did not have the benefit of the *Roadway Express* opinion, but relied upon its earlier decision in *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992), *reh'g denied*, 29 F.3d 643 (11th Cir. 1994), to find that the Civil Rights Act of 1991 did not retroactively overrule *Patterson*. *Vance*, 983 F.2d at 1577-78. Petitioner argues that the Eleventh Circuit's reliance on *Baynes* results in a "manifest injustice" to Petitioner. *See* Petition at 7-8. According to Petitioner,

> two decisive differences [exist] between *Baynes* and the current case. First, unlike *Baynes*, this case was tried on the basis of the pre-*Patterson* state of the law and affirmance would uphold, rather than upset, the district court's judgment. . . . Secondly, the twice-proven racial

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[4] *See Roadway Express*, 114 S. Ct. at 1513, 1518-19; Civil Rights Act of 1991, Pub. L. No. 102-166, § 402.

> harassment and discrimination was illegal when it occurred in 1985, and at all other times since then. . . .

Petition at 7 (citing *Vance*, 983 F.2d at 1578, 1579 n.3 (Fay, J., concurring)).

Contrary to Petitioner's arguments, § 1981 – as originally enacted – did not encompass Petitioner's racial harassment, discriminatory denial of transfer, and constructive discharge claims against Southern Bell. *See Patterson*, 491 U.S. at 176. Indeed, § 1981 prohibited such conduct only after enactment of the Civil Rights Act of 1991, which does not apply retroactively to claims arising before November 21, 1991. *See Roadway Express*, 114 S. Ct. at 1513, 1519.

Because neither of the two asserted "decisive differences" between *Baynes* and this case exists, the Eleventh Circuit clearly did not commit any "manifest injustice" in relying upon *Baynes*. The *Vance* court properly refused to apply the 1991 Act retroactively to overrule *Patterson* and salvage Petitioner's § 1981 claims.

E. The decision of the Eleventh Circuit in *Vance* does not result in any "manifest injustice" to Petitioner.

Although Petitioner may have had a valid claim under Title VII, *see Patterson*, 491 U.S. at 180-81, she chose instead to sue Southern Bell only under § 1981. Petitioner cannot now avoid the effect of her decision by asserting that proper interpretation and application of the law results in "manifest injustice" and deprives her of any legal remedy. Petition at 5-8. As this Court recognized in *Roadway Express*,

> The essence of judicial decision-making – applying general rules to particular situations – necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.

114 S. Ct. at 1519.

F. Because the Eleventh Circuit correctly decided *Vance*, this Court should not exercise its discretionary jurisdiction to review the decision.

Petitioner fails to demonstrate any compelling reason justifying this Court's discretionary review of *Vance*. Petitioner's argument that the "statutory nullification" of *Patterson* required the Eleventh Circuit to rely upon the "pre-*Patterson* prohibition of racial harassment" lacks merit, for

> *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991.

Roadway Express, 114 S. Ct. at 1519. The Eleventh Circuit properly ruled that § 1981 – as originally enacted and as interpreted by the Court in *Patterson* – did not encompass Petitioner's racial discrimination and harassment claims. The decision reached by the *Vance* court is consistent with recent decisions of this Court, and does not demonstrate any "special and important reasons" for discretionary review. Sup. Ct. R. 10.1.

III. THE ELEVENTH CIRCUIT'S RETROACTIVE APPLICATION OF *PATTERSON* TO BAR PETITIONER'S § 1981 CLAIMS DOES NOT DEPRIVE PETITIONER OF HER CONSTITUTIONAL RIGHTS OF DUE PROCESS OR TRIAL BY JURY.

According to Petitioner, the Eleventh Circuit's retroactive application of *Patterson* leaves her without a legal remedy, thereby depriving Petitioner of her constitutional guarantees of due process and trial by jury. Petition at i, 5-8. Yet not only does the Petition fail to demonstrate exactly *how* Petitioner has been denied any of her constitutional rights, consideration of relevant case law interpreting the Fifth and Seventh Amendments provides no support for Petitioner's arguments.

Petitioner asserts throughout her Petition that she relied upon the "pre-*Patterson* prohibition of racial harassment," as if to suggest that the denial of her § 1981 claims deprives her of vested property rights under the Fifth Amendment. *See* Petition at 5-8. Yet neither the Supreme Court (in deciding *Patterson*) nor the Eleventh Circuit (in applying *Patterson* to the facts of this case) has violated Petitioner's Fifth Amendment due process rights. Courts remain free to change interpretations of statutes and rules,[5] for "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917). And because Petitioner does not have a vested property interest in her claim for damages,[6] the Eleventh Circuit's application of the *Patterson*

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[5] *See Eddings v. Volkswagenwerk*, 835 F.2d 1369, 1374 (11th Cir.), *cert. denied sub nom., Griffin v. Ford Motor Co.*, 488 U.S. 822 (1988).

[6] *See Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125, 1137 (E.D. La. 1985); *see also Hammond v. United States*, 786

rule does not deprive Petitioner of her due process rights.[7] An appellate court "must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law." *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801));[8] *accord Bradley*, 416 U.S. 696, 714 (1974).

Nor does the statutory revision of § 1981 in any way deny Petitioner's constitutional due process rights. Congress – as well as the courts – may create new rights, for

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F.2d 8, 12 (1st Cir. 1986) ("rights in tort do not vest until there is a final, unreviewable judgment"); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) ("a plaintiff has no vested right in any tort claim for damages under state law").

[7] In *Lustgarden v. Gunter*, the federal district court found that the due process clause

> does not prohibit retrospective application of a judicial decision interpreting a [criminal] statute if it was sufficiently foreseeable to a defendant that the interpretation could have applied to that defendant's case.

779 F. Supp. 500, 502 (D. Colo. 1991), *aff'd*, 966 F.2d 552 (10th Cir. 1992); *accord Lerner v. Gill*, 751 F.2d 450, 457 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985); *see also Bouie v. Columbia*, 378 U.S. 347, 353-55 (1964).

[8] In *Schooner Peggy* the Supreme Court explained:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

5 U.S. (1 Cranch) at 110.

> [t]he guarantees of due process do not forbid the creation of new causes of action or the abolition of old ones to obtain permissible legislative objectives.

Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 459 (E.D. La. 1990) (citing *Silver v. Silver*, 280 U.S. 117, 122 (1929)).

Petitioner also contends that, in retroactively applying *Patterson* (despite its asserted "statutory nullification"), the Eleventh Circuit has denied Petitioner "her Seventh Amendment guarantee of trial by jury." Petition at 6-8. Neither the language of the Seventh Amendment nor case law interpreting the Constitution supports Petitioner's conclusion.

The Seventh Amendment – which provides that "no **fact** tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law," U.S. Const. amend. VII (emphasis added) – does not preclude an appellate court from determining whether the governing rules of federal law have been properly applied to the facts. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 286 n.26 (1964). In *Vance* the Eleventh Circuit considered the following issues:

> First, whether the district court erred by refusing to apply *Patterson* retroactively; and second, whether the Civil Rights Act of 1991 overrules *Patterson* retroactively.

983 F.2d 1573, 1575. Upon its review of these two questions of law, the *Vance* court found that the lower court had not properly applied the governing rules of law to the facts of the case. 983 F.2d at 1575. Such a limited scope

of review is well within the bounds of the Seventh Amendment, and in no way deprives Petitioner of her right to trial by jury.

IV. PETITIONER FAILS TO DEMONSTRATE THAT THE ENTRY OF THE DIRECTED VERDICT ON HER STATE LAW TORT CLAIM DEPRIVES HER OF HER SEVENTH AMENDMENT RIGHTS.

Finally, Petitioner argues that because the Eleventh Circuit "erroneously affirmed the district court's directed verdict" on her state law tort claim, she has been deprived of her Seventh Amendment rights to trial by jury. Petition at 8-9. Again, Petitioner fails to demonstrate a single compelling reason for the exercise of this Court's discretionary review, especially in light of the great deference to be accorded to the lower federal courts' interpretations of state law.

The Petitioner does not even mention – much less try to overcome – the "great deference" usually given by the Supreme Court to the "interpretation and application of state law by the courts of appeals." *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Indeed, as this Court noted in *Regents of University of Michigan v. Ewing*,

> [W]e are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.

474 U.S. 214, 223 n.10 (1985).

Petitioner has not shown any reason why this Court should not give its usual deference to the Eleventh Circuit's interpretations of state law. The Eleventh Circuit, of

course, frequently decides questions of Florida law; Florida is by far the most populous of the states within the Circuit, with numerous divisions of the federal district courts located throughout the state. The Eleventh Circuit's capacity to interpret questions of Florida law correctly is demonstrated by the thoroughness with which the Eleventh Circuit discusses and applies the Florida cases cited in *Vance*. *See* 983 F.2d at 1575 n.7.

Moreover, the Eleventh Circuit accurately interpreted Florida law. *See Vance*, 983 F.2d at 1575 n.7. In ruling that the federal district court properly dismissed the state law claim, the *Vance* court discussed a number of Florida decisions, each of which clearly supported its conclusion. *Id.* Although the Petitioner asserts that the directed verdict deprives her of her constitutional rights to trial by jury, apparently she does not disagree with the Eleventh Circuit's interpretation of Florida law. *See* Petition at 9.

The Federal Rules of Civil Procedure require that a trial court find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party" before directing a verdict. Fed. R. Civ. P. 50(a). Entry of a directed verdict, then, necessarily does not interfere with an individual's Seventh Amendment right to trial by jury, for the Constitution requires only that bona fide issues of *fact* be submitted to the jury. *See* U.S. Const. amend. VII; *see also Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1077 n.3 (9th Cir. 1986) (summary judgment).

Petitioner's Seventh Amendment right to trial by jury has not even been implicated by entry of the directed verdict, much less "wrongfully deprived." Petition at 9.

The Eleventh Circuit agreed with the federal district court that the conduct alleged by Petitioner did not support a claim for intentional infliction of emotional distress under the law of Florida. *Vance*, 983 F.2d at 1575 n.7. Having made the proper findings under Rule 50, neither the federal district court nor the Eleventh Circuit has precluded a jury's consideration of bona fide issues of fact.

Therefore, the entry of the directed verdict clearly has not violated Petitioner's Seventh Amendment rights to trial by jury. *See, e.g., Cox v. City of Freeman*, 321 F.2d 887, 891 (8th Cir. 1963); *see also Sengupta*, 804 F.2d at 1077 n.3 (summary judgment). As the Eighth Circuit concluded in *Cox*,

> This argument is not legally nor practically sound. A directed verdict does not deprive the plaintiff of any right guaranteed to . . . [her] by the Seventh Amendment to the United States Constitution.

321 F.2d at 891.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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